Supreme Court, U.S.
FILED
04 147 JUL 29 2004
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

MARVIN POLK, WARDEN,
Petitioner,

v.

TIMOTHY LANIER ALLEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI
[Capital Case]

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Capital Case

QUESTIONS PRESENTED

I. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.**

II. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW.**

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION 2

STATEMENT OF THE CASE 2

I. Procedural History 2

II. Facts Relevant to the Petition 5

REASONS WHY THE WRIT SHOULD ISSUE 8

I. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.. 8

II. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW. 13

CONCLUSION 22

APPENDIX:

A. Order of the United States Court of Appeals for the Fourth Circuit, *Allen v. Lee*, 370 F.3d 402 (4th Cir. 2004) 1a

B. Opinion of the en banc United States Court of Appeals for the Fourth Circuit, *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) 29a

C. Order of The Honorable Malcolm J. Howard, United States District Court Judge, Eastern District of North Carolina, dated 19 December 2001 . . . . . 114a

D. Opinion of the North Carolina Supreme Court on remand from the United States Supreme Court, *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227 (1992) 174a

TABLE OF AUTHORITIES

CASES: *Page(s)*

Allen v. Lee, No. CA-97-959-5-H-HC (E.D.N.C., Order filed June 9, 1998) 1

Allen v. Lee, 319 F.3d 645 (4th Cir. 2003) 5

Allen v. Lee, 2003 U.S. App. LEXIS 5760 (4th Cir. 2003) 5

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) .. 1, 5, 11, 20, 21

Allen v. Lee, 370 F.3d 402 (4th Cir. 2004) ..... 1, 5 ,7, 13-19, 21

Allen v. North Carolina, 494 U.S. 1021 (1990) 3

Allen v. North Carolina, 507 U.S. 967 (1993) 3

Allen v. North Carolina, 507 U.S. 1046 (1993) 3

Allen v. North Carolina, 522 U.S. 846 (1997) 4

Barclay v. Florida, 463 U.S. 939 (1983) 19, 20

Bell v. Cone, 535 U.S. 685 (2002) 8, 9

Brecht v. Abrahamson, 507 U.S. 619 (1993) 14, 21

Chapman v. California, 386 U.S. 18 (1967) 10

Early v. Packer, 537 U.S. 3 (2002) 13

CASES: *Page(s)*

Holland v. Jackson, __U.S. __, __, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) 12

Lindh v. Murphy, 521 U.S. 320 (1997) 8, 9

McKoy v. North Carolina, 494 U.S. 433 (1990) 3, 4, 11, 13, 20

Middleton v. McNeil, 541 U.S. __, 124 S.Ct. 1830 (2004) 11, 12

Mitchell v. Esparza, 540 U.S. 12, 124 S. Ct. 7 (2003) . . . 12

Price v. Vincent, 538 U.S. 634, 123 S.Ct. 1848 (2003) . . 13

State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988) 3

State v. Allen, 331 N.C. 746, 417 S.E.2d 227 (1992) 3, 9

State v. Allen, 345 N.C. 644, 483 S.E.2d 179 (1997) 4

Stringer v. Black, 503 U.S. 222 (1992) 19

Williams v. Taylor, 529 U.S. 362 (2000) 8-10

Woodford v. Visciotti, 537 U.S. 19 (2002) 13

Yarborough v. Gentry, 540 U.S. 1, 157 L. Ed. 2d 1, 124 S. Ct. 1 (2003) 13

OTHER AUTHORITIES: *Page(s)*

28 U.S.C. § 2254(d) 8, 21

28 U.S.C. § 2254(d)(1) 2

N.C. Gen. Stat. § 15A-2000 3

PETITION FOR WRIT OF CERTIORARI

The Office of the Attorney General of North Carolina, on behalf of Marvin Polk,[1] Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Allen v. Lee, 370 F.3d 402 (4th Cir. 2004) (En banc panel's order denying rehearing) (Pet. App. A).

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) (En banc panel's per curiam opinion reversing and remanding to the district court with instructions to issue a writ of habeas corpus) (Pet. App. B).

Allen v. Lee, No. CA-97-959-5-H-HC (E.D.N.C., Order filed June 9, 1998) (dismissing and denying petition for writ of habeas corpus) (Pet. App. C).

JURISDICTION

The judgment and opinion of the en banc court of appeals were entered on 28 April 2004. (Pet. App. 29a). The Fourth Circuit denied the State's Petition for 2nd Rehearing En Banc on 4 June 2004. (Pet. App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Mr. Marvin Polk replaced R.C. Lee as warden of Central Prison on 1 August 2003.

STATUTORY PROVISION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

I. Procedural History

Almost twenty years ago, in the midst of an interstate crime spree, Allen murdered Trooper Raymond E. Worley while Trooper Worley was performing his duties as a member of the North Carolina State Highway Patrol. After he murdered Trooper Worley, Allen and his companions, Mack Green, Antonio Worrell, and Alex Allen fled. Law enforcement apprehended Allen and his companions. Shortly thereafter, Allen confessed to law enforcement that he killed Trooper Worley. Two days later Allen confessed to one of his attorneys that he murdered Trooper Worley.

On 20 May 1985, Allen was indicted for the first degree murder of Trooper Worley and for three counts of possessing stolen goods. Allen was tried at the 27 November 1985

Criminal Session of the Superior Court of Halifax County, the Honorable Mary M. Pope, Judge Presiding.

The jury returned verdicts of guilty of first degree murder by premeditation and deliberation and of three counts of felonious possession of stolen goods. Pursuant to a sentencing hearing held on the first degree murder conviction under N.C. Gen. Stat. § 15A-2000, the jury recommended the death sentence for Allen.

Allen appealed his conviction and sentence to the North Carolina Supreme Court. In *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), the North Carolina Supreme Court affirmed Allen's verdict and death sentence on 6 October 1988.

Allen subsequently filed a Petition for Writ of Certiorari in this Court. On 19 March 1990, this Court granted certiorari, vacated the judgment and remanded for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990). *Allen v. North Carolina*, 494 U.S. 1021 (1990).

On 25 June 1992, the Supreme Court of North Carolina held that, while there was *McKoy* error in the jury charge, the error was harmless beyond a reasonable doubt and the court reinstated Allen's death sentence. *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227 (1992) (Pet. App. 174a).

On 1 March 1993, this Court refused to review the decision of the North Carolina Supreme Court. *Allen v. North Carolina*, 507 U.S. 967 (1993), and subsequently denied Allen's Petition for Rehearing. *Allen v. North Carolina*, 507 U.S. 1046 (1993).

On 1 June 1994, Allen filed a Motion for Appropriate Relief in the Superior Court of Halifax County, raising

challenges to his conviction and sentence of death, including several claims of ineffective assistance of counsel.

By an Order dated 6 April 1995, the state post-conviction court granted summary judgment to the State as to several of Allen's claims included in his Motion for Appropriate Relief. In particular, Claim III, the claim that the McKoy error in Allen's trial was not rendered harmless by the post-deliberation poll, and Claim IV, the claims that Allen's constitutional rights were violated by his exclusion from an *ex parte voir dire* of a juror were procedurally barred. Because of the procedural bar, Judge Lamm also struck affidavits that Allen had filed in support of the *McKoy* claim.

After several hearings and multiple amendments to Allen's MAR the Superior Court of Halifax County denied Allen's Motion for Appropriate Relief by Order dated 23 August 1996. The trial court also heard brief argument on the Motion for Discovery and then denied Allen's discovery motion. On 16 December 1996, Allen petitioned the Supreme Court of North Carolina for a writ of certiorari. The Supreme Court of North Carolina issued an Order denying the petition on 11 February 1997. *State v. Allen*, 345 N.C. 644, 483 S.E.2d 179 (1997).

On 11 June 1997, Allen filed a Petition for Writ of Certiorari in the United States Supreme Court. On 6 October 1997, the United States Supreme Court denied review. *Allen v. North Carolina*, 522 U.S. 846 (1997).

Allen filed a Petition for a Writ of Habeas Corpus on 9 February 1998. The State filed an Answer and Motion for Summary Judgment on 9 April 1998. Allen filed an amendment on 1 December 1998 and the State filed an Answer and Motion for Summary Judgment on the amendment on 23 February 1999.

On 30 November 1998, Allen filed a second Motion for Appropriate Relief in the Superior Court of Halifax County. In its Order of 31 March 2000 the Superior Court of Halifax County found that the claims in the defendant's second Motion for Appropriate Relief (MAR2) were without merit and were procedurally barred. The claims contained in Allen's MAR2 are the same claims contained in his amendment to his habeas petition filed 1 December 1998.

On 19 December 2001, the District Court entered an Order granting the State's motion for summary judgment and denying Allen's petition for writ of habeas corpus. On 27 February 2002 the District Court entered an Order denying Allen's Motion to Alter or Amend Judgment. On 29 March 2002 Allen filed a Notice of Appeal in District Court. The District Court granted a certificate of appealability on 19 April 2002.

A three judge panel of the Fourth Circuit vacated and remanded the case in a split opinion. *Allen v. Lee*, 319 F.3d 645 (4th Cir. 2003) The State's motion for rehearing and rehearing en banc was granted and the panel opinion was vacated. *Allen v. Lee*, 2003 U.S. App. LEXIS 5760 (4th Cir. 2003)

At rehearing, the en banc Fourth Circuit issued a per curiam opinion reversing and remanding to the district court with instructions to issue a writ of habeas corpus. *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (Pet. App. 29a). The State's motion for a second rehearing was denied. *Allen v. Lee*, 370 F.3d 402 (4th Cir. 2004) (Pet. App. 1a).

II. Facts Relevant to the Petition

Shortly after murdering Trooper Worley on 14 May 1985, Allen confessed to law enforcement. Two days later Allen also

confessed to one of his attorneys that he murdered Trooper Worley.[2]

In his confession to law enforcement, Allen said that on 11 May 1985, he left Washington, D.C. with Alex Allen, Antonio Worrell, and Mark Greene. Allen stated that Antonio Worrell was driving a van stolen from Maryland and that he, Alex Allen, and Worrell were there when the van was stolen. After they stole the van, they went to Wallace, North Carolina, to see a girlfriend of Worrell's. At around midnight on 13 May 1985, Allen and the other suspects were returning to Washington, D.C. On the way, they broke into a store by going in through a wall in the restroom. Allen and the other suspects took beer, cigarettes, a .22 pistol and a .38 pistol. Allen kept the .38 caliber pistol, and Worrell kept the .22. After breaking into the store, Allen and the other suspects headed for home. Worrell hot-wired a white van and took it from a car lot. He and Greene drove that van while Allen and his brother Alex drove the van that had been stolen in Maryland.

Allen and his brother traveled in the back van while Worrell and Greene traveled in the front van. A patrol car turned on its blue light while going around Allen's van. The car stopped Worrell. Allen pulled his van over behind Trooper Worley and stopped. Trooper Worley told Allen to get out of his van and come to his car. When he opened the patrol car door to get in, Allen had his pistol in his belt. When Trooper Worley reached over to open the car door for him to get in, Allen pulled his gun and fired twice at Trooper Worley. Then he ran back to his van and got in.

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[2] Although unknown to the State at trial, Allen also confessed to one of his trial attorneys, Steve Graham on 16 May 1985, two days after his confession to law enforcement. The second confession was consistent with the confession given to the police two days earlier.

At that point, Allen drove the van away with Worrell, Greene, and Alex with him. Allen drove down a long road, through a field, into some woods and parked the van. Allen and the others began to run. They ran until the officers caught them.

In his dissent to the denial of rehearing, Judge Luttig summed up the facts of this murder:

> On May 11, 1985, in the midst of an interstate crime spree, Allen pulled up behind the patrol car of North Carolina State Highway Trooper Raymond E. Worley in a stolen van. Trooper Worley had, only moments earlier, stopped a different stolen van -- a vehicle that Allen himself had helped to hot-wire and steal -- driven by Antonio Worrell, one of Allen's partners in the crime spree. After escorting Worrell into his patrol car, Worley motioned for Allen to exit from the stolen van that he was driving and approach the patrol car, which Allen did. Unbeknownst to Trooper Worley, however, Allen was armed, and, when Trooper Worley reached to unlock the patrol car door for him, Allen fired three shots at Worley at point blank range, once through the head. Allen and Worrell then left Worley on the side of the highway, slumped over in the patrol car. Literally drowning to death in his own blood, Worley died some four minutes later, leaving his wife without a husband and his two children without a father.

Allen v. Lee, 370 F.3d 402, 408 (4th Cir. 2004) (Luttig, J., dissenting) (Pet. App. 12a).

REASONS WHY THE WRIT SHOULD ISSUE

I. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.

Allen's federal habeas corpus petition, filed after April 24, 1996, is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336-38 (1997). AEDPA substantially changed the role of the federal judiciary in reviewing habeas petitions, in particular, limiting the authority to grant the writ, even where the federal court concludes in its independent judgment that the decision of the state court was incorrect. *Bell v. Cone*, 535 U.S. 685, 693 (2002). As this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court's inquiry is limited under AEDPA to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

The standard for granting habeas relief with respect to claims that have been previously adjudicated on the merits in state court is a narrow one set forth in 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court has instructed that a state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that is different from the governing law set forth in Supreme Court decisions, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. A federal court may grant habeas relief under the "unreasonable application" clause if the state court correctly identifies the governing principal, but unreasonably applies it to the facts of the particular case. *Bell*, 535 U.S. at 694; *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Because AEDPA's "new, highly deferential standard for evaluating state court rulings" is designed to "ensure that state-court convictions are given effect to the extent possible under law," a state court's ruling must be viewed in terms of its "objective reasonableness." *Bell*, 535 U.S. at 693; *Williams*, 529 U.S. at 403-04; *Lindh*, 521 U.S. at 333 n.7.

The North Carolina Supreme Court, on remand from this Court, held that the *McKoy* error at Allen's trial was harmless beyond a reasonable doubt. The North Carolina Supreme Court based this finding on a post-sentence jury poll where each juror was instructed by the clerk that they would be "asked individually as to your answers to the issues and as to the recommendation". *State v. Allen*, 331 N.C. 746, 747, 417 S.E.2d 227, 228 (1992) (Pet. App. 174a-175a).

Because the North Carolina Supreme Court correctly identified the relevant standard from this Court's decision in *Chapman v. California*, 386 U.S. 18, 24 (1967), the issue before the Fourth Circuit was whether the North Carolina Supreme Court's conclusion that the *McKoy* error was harmless beyond a reasonable doubt was an unreasonable application of *Chapman*. In a per curiam opinion a majority of the Fourth Circuit held it was an unreasonable application. The Fourth Circuit decision was contrary to the standard of review required under 28 U.S.C. § 2254(d)(1) and this Court's decision in *Williams v. Taylor,* 529 U.S. 362 (2000).

The jury poll process was described by Fourth Circuit Judge Niemeyer in his dissent below.

> After the jury returned its verdict and the clerk read it in open court, the trial judge conducted a poll instructing the jury as follows:
>
> > Members of the jury, at this time I am going to ask that Madam Clerk, when she is ready, poll each of you. This is the same procedure that we used on Monday. *You will be asked individually* as to your answers to the issues and as to the recommendation.
>
> (Emphasis added). Each individual juror was then polled on the verdict form, including the answers to each of the mitigating circumstances, and asked, "Are these the answers to your issues" and "And do *you* still

> assent thereto?" (Emphasis added). In each case, the juror said "yes." Then each individual juror was asked whether the recommendation of the death penalty was "still *your* recommendation" (emphasis added) and whether the individual juror "still assented thereto." Again, in each case, the juror responded that this was his or her individual recommendation. Because each juror *individually* indicated that the vote on the ten mitigating factors was also his or her individual vote, the verdict on the mitigating factors was in fact unanimous, and the *McKoy* error did not deny any juror the opportunity to consider his or her individual finding of a mitigating circumstance.

Allen v. Lee, 366 F.3d 319, 352 (4th Cir. 2004) (Pet. App. 91a) (Niemeyer, J., dissenting) (emphasis in original).

The North Carolina Supreme Court understood this Court's holding in *McKoy* and acknowledged that *McKoy* error existed in Allen's case. The North Carolina Supreme Court then determined that the jury poll rendered the McKoy error harmless beyond a reasonable doubt.

In *Middleton v. McNeil*, 541 U.S. __, 124 S.Ct. 1830 (2004), this Court stated:

> A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

> § 2254(d)(1). "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Yarborough v. Gentry*, 540 U.S. 1, ___, 157 L. Ed. 2d 1, 124 S. Ct. 1 (2003) (slip op., at 4-5) (per curiam); *see Williams v. Taylor*, 529 U.S. 362, 409, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)

Id. at ___, 124 S.Ct. at 1832.

In *McNeil*, as in the present case, the jury instructions contained error. The California Supreme Court held that, in spite of the erroneous instruction, there was no reasonable likelihood the jury was misled and affirmed that defendant's conviction. The District Court denied that defendant's habeas petition and the Ninth Circuit reversed. This Court then reversed the Ninth Circuit opinion. Like the Ninth Circuit in *McNeil*, the per curiam opinion of the Fourth Circuit in the present case "failed to give appropriate deference to the state court's decision." *Id.* at ___, 124 S.Ct. at 1832.

The Fourth Circuit's decision to grant federal habeas relief in this case, in the face of the state court's well-reasoned determination to the contrary, is similar to other instances of overreaching by some federal courts in the context of federal habeas challenges to state-court criminal convictions. *See, e.g., McNeil*, 541 U.S. ___, 124 S. Ct. 1830; *Holland v. Jackson*, __U.S. __, __, 124 S. Ct. 2736, __, 159 L. Ed. 2d 683, 689 (2004); (State-court decisions are to be given "the benefit of the doubt"); *Mitchell v. Esparza*, 540 U.S. 12, __, 124 S. Ct. 7, 9 (2003) (*per curiam*) (Sixth Circuit decision "ignores the limits imposed on federal habeas review by 28 U.S.C. §2254(d)" and "failed to cite, much less apply, this section"); *Yarborough v.*

Gentry, 540 U.S. 1, __, 124 S. Ct. 1, 7 (2003) ("Ninth Circuit's conclusion . . . gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials"); *Price v. Vincent*, 538 U.S. 634, 123 S.Ct. 1848, 1852 (2003) ("Although the [Sixth Circuit] Court of Appeals recited [the AEDPA standard], it proceeded to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (*per curiam*) (Ninth Circuit's grant of habeas relief "exceeds the limits imposed on federal habeas review by 28 U.S.C. §2254(d)"); *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (same).

The majority opinion below on the *McKoy* issue, like the circuit opinions listed above, exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d) and conflicts with this Court's relevant decisions. Certiorari is warranted under Supreme Court Rule 10(c).

II. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW

Of the ten mitigating factors submitted by the trial court to the jury, three factors were found unanimously by the jury: (1) Allen had no history of use of deadly weapons, (2) Allen expressed remorse for killing Trooper Worley and (3) Allen completed his GED high school equivalency. *Allen v. Lee*, 370 F.3d 402, 408 (4th Cir. 2004) (Pet. App. 13a). The two aggravating factors found by the jury were (1) Trooper Worley was murdered while engaged in his official duties and (2) Allen

killed Trooper Worley to avoid arrest. *Id.* at 409 (4th Cir. 2004) (Pet. App. 14a).

The jury did not find unanimously the remaining submitted factors: (1) Allen had no significant history of criminal activity, (2) Allen being 'only' thirty years old at the time he killed Trooper Worley, (3) Allen was raised in a single parent home, (4) Allen is the father of three sons, (5) Allen remained employed when not incarcerated, (6) Allen supported one of his children and (7) any other circumstance arising from the evidence. *Id.* at 403 (4th Cir. 2004) (Pet. App. 2a).

Based upon the *McKoy* error and the mitigating factors submitted to the jury, the per curiam by a majority of the Fourth Circuit held that the *McKoy* error at Allen's sentencing phase was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). This holding is in conflict with this Court's opinions and should be reversed.

To obtain habeas relief based on trial error, a habeas petitioner must establish that "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In *Brecht* this Court concluded

> "Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeachment purposes of petitioner's post-*Miranda* silence, see n. 2, *supra*, "had substantial and injurious effect or influence in determining the jury's verdict." We think it clear that it did not.

Id. at 638.

In the present case a review of the whole record, including the aggravating factors surrounding Allen's murder of Trooper Worley and the mitigating factors submitted but not found unanimously by the jury, it is clear there was no "substantial and injurious effect" on the jury's verdict by the *McKoy* error.

The mitigating factors excluded from the jury's consideration due to the *McKoy* error were of exceedingly little value, assuming that they possessed any value at all. None of these factors would have influenced a reasonable juror to spare Allen's life given the crime he committed and aggravating factors before the jury.

Judge Luttig's describes, in great detail, each of these mitigating factors rejected by the jury, as well as the evidence presented at trial of each factor, in his dissent to the denial of rehearing.

As to the first rejected mitigator, "Allen had no significant history of criminal activity" Judge Luttig states that:

> Allen's criminal history record is not one that would prompt thought of mitigation. The record discloses that Allen had multiple prior convictions, for shoplifting, breaking and entering, and two counts of second degree burglary.

Allen v. Lee, 370 F.3d 402, 411 (4th Cir. 2004) (Luttig, J., dissenting) (Pet. App. 17a).

As to the second rejected mitigator, "age":

> Neither would the second mitigating factor, Allen's age, lead any juror to vote for a life sentence for

> Allen. Indeed, at the time of the murder, Allen was neither juvenile, nor elderly; rather, born to Petersburg, Virginia parents in 1955, Allen was, as noted, *thirty years old* at the time that he murdered Trooper Worley. It would, of course, be entirely irrational for a juror to consider this fact one in mitigation of the brutal murder of a state trooper while he was engaged in the discharge of his official duties.

Id. at 411 (Luttig, J., dissenting) (Pet. App. 17a).

As to the third rejected mitigator, "Allen was raised in a single parent home":

> As to this mitigating factor, the plurality relates that Allen "only" saw his father three or four times a year after his parents divorced and until Allen entered sixth grade. Slip Op. at 44. The plurality omits to mention, however, that, although Allen's parents had divorced when Allen was three, Allen's father remained financially supportive and in close contact with his children after the divorce. R. 3130-31. In fact, Allen's mother testified, and the jurors in the sentencing proceeding heard, that after Allen's mother moved with her children from Petersburg, Virginia, to Washington, D.C. (where Allen's father had relocated after the divorce) shortly before the start of Allen's sixth-grade year, Allen's father "was over to the house each and every other day to see the children and to see that they was minding, that they were in school, and were they getting their lessons, and if anything went wrong, he always chastised them." R. 3131. And, when Allen came of age to work, his father gave Allen and his first wife a job at the grocery store that Allen's father had established and owned. R. 3075. Thus, although the plurality would like to leave one

> with the impression that Allen did not have a strong male role model, such is anything but the case.
>
> Additionally, Allen's mother testified that Allen had received a church education and had "plenty" while growing up. R. 3143-44. And as for the difficulties of "single-parent rearing," Allen's mother further stated that she did not raise her children alone; the children's grandmother lived with them at all times, and looked after them when Allen's mother was at work. R. 3127, 3129. The plurality mentions none of this obviously relevant evidence, even as it claims that "any one" of the five factors it deems "colorable" -- necessarily including Allen's "single-parent rearing" -- could have led a juror to vote for a life sentence.
>
> In light of all of this evidence, and Allen's admission that he had suffered no physical abuse or neglect from his parents while growing up, R. 3087, it is unsurprising that the jury did not unanimously vote to consider Allen's rearing in a single-parent home to be a mitigating factor. It would have been affirmatively surprising for *any* juror to find that Allen's rearing should be accorded any mitigating weight at all in light of the specific crime that Allen had committed.

Id. at 411-412 (Luttig, J., dissenting) (Pet. App. 17a-18a).

As to the fourth and sixth rejected mitigators, that "Allen is the father of three sons" and that "Timothy Lanier Allen was a supporting parent of at least one of his children.":

> While it is true as a factual matter that Allen fathered three sons, Allen lived with exactly none of his offspring. And in the very mitigating factor submitted to the jury, he only claimed before the court to be a supporting parent of one of them. The juxtaposition of

> these two mitigating factors -- that Allen had three sons, but supported only one of them -- would more likely have evoked distaste than sympathy.

Id. at 412 (Luttig, J., dissenting) (Pet. App. 18a-19a).

As to the fifth rejected mitigator, "Timothy Lanier Allen remained employed during the times he was not incarcerated":

> Obviously this provides an exceedingly uncomfortable basis for mitigation. The very statement of this factor is an unsettling reminder to the jury that there were other periods in Allen's life during which he was doing time in prison for other crimes, precisely the kind of evidence that would, if anything, reinforce the jury's considered sentencing conclusion.

Id. at 412 (Luttig, J., dissenting) (Pet. App. 19a).

The final rejected mitigator was "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value". There was little evidence to support a reasonable "catch-all" mitigating factor such that a reasonable juror would have been guided to reject the death penalty.

> None of this evidence would have remotely influenced a reasonable juror to spare Allen's life. It denigrates the seriousness of Allen's offense for the majority even to intimate that, for example, a juror would have found that a fight that occurred between Allen's parents at Allen's *third* birthday party, twenty-seven years before he murdered Trooper Worley, or that Allen was "shy" would be relevant to Allen's culpability in taking the life of Raymond Worley,

> much less sufficiently dispositive to warrant a life sentence. Obviously, Allen's does not even begin to approach the type of "nightmarish" childhood that might have led a juror to believe Allen had no option but to lead a life of violence and self-destruction that ultimately culminated in the murder of which Allen was convicted. *Williams v. Taylor, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).* It bears repeating that Allen testified that he had suffered no physical abuse or neglect at his parents' hands, and that his parents got along most of the time when they were together.

Id. at 413 (Luttig, J., dissenting) (footnotes omitted) (Pet. App. 20a-21a).

To find that the erroneous jury instruction had a "substantial and injurious effect or influence on the jury's verdict" sentencing a defendant to death, "the court must determine what the sentencer would have done absent" the error. *Stringer v. Black,* 503 U.S. 222, 230-31 (1992). Nothing in the above mitigating factors, and the evidence in support thereof, could remotely be termed as having an "substantial" effect.

In *Barclay v. Florida, 463 U.S. 939 (1983),* this Court reviewed a capital case where the trial court had improperly considered an aggravating circumstance and on appeal the state appellate court held the error harmless given the facts of the case. This Court stated:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating

> circumstances could not possibly affect the balance. See n. 9, *supra*. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

Id. at 958 (emphasis in original).

In the present case comparing the aggravating and mitigating evidence which the jury did consider to the particular evidence which the jury was prevented by the faulty jury instruction from considering (mitigating factors of exceedingly low value), it is clear the error was harmless and had no "substantial and injurious effect" on the jury's verdict.

The conclusion that the *McKoy* error did not have a "substantial and injurious effect" on the jury's penalty phase verdict is supported by the jury poll where the jurors were told *"[y]ou will be asked individually* as to your answers to the issues and as to the recommendation". All the jurors responded individually that was their vote. This is logical, given the questionable value of the mitigating factors that were rejected by the jury. Additionally, the trial instructed the jury prior to the poll:

> Members of the jury, at this time I am going to ask that Madam Clerk, when she is ready, poll each of you. **This is the same procedure that we used on Monday**. You will be asked individually as to your answers to the issues and as to the recommendation

Allen v. Lee, 366 F.3d at 352 (Pet. App. 91a) (Niemeyer, J., dissenting) (emphasis added).

Therefore the trial judge told the jury that the poll was the same as the poll conducted after the guilty verdict, where each

was individually asked as to their own answers. This further demonstrated to the jury that what the poll sought was their answers as individuals and not reaffirmation of the jury's collective response. Clearly there was no "substantial and injurious effect" on the jury's verdict.

Judge Williams, in her dissent, held that the Fourth Circuit en banc opinion was in conflict with this Court's opinion in *Brecht*. *Allen v. Lee*, 366 F.3d 319, 354 (4th Cir. 2004) (Williams, J., dissenting) (Pet. App. 95a-96a). Judge Luttig also held in his dissent to the Fourth Circuit's denial of the State's Second Motion for Rehearing that the en banc opinion was in conflict with this Court's opinion in *Brecht*. *Allen v. Lee*, 370 F.3d 402, 417 (4th Cir. 2004) (Luttig, J., dissenting) ("An opinion that flouts more conspicuously the Supreme Court's decision in *Brecht* v. *Abrahamson* one would be hard-pressed to imagine.") (Pet. App. 28a).

On 14 May 1985, Allen murdered Trooper Raymond E. Worley while Trooper Worley was performing his duties as a member of the North Carolina State Highway Patrol. After he murdered Trooper Worley, Allen ran until he was apprehended by law enforcement. Now over nineteen years later, the Fourt Circuit has overturned the sentence issued by the people of North Carolina without providing a detailed explanation this Court requires under *Brecht*. The factors that were rejected by the jury under the faulty instructions were of minimal value. The Fourth Circuit majority opinion failed to give a reasoned weighing of mitigating factors and aggravating circumstances as is required by *Brecht*. The majority opinion exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d) and conflicts with this Court's relevant decisions. Certiorari is warranted under Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to summarily reverse the Fourth Circuit panel's *per curiam* opinion or, in the alternative, to review the decision of the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

Filed: June 4, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY LANIER ALLEN,
Petitioner-Appellant,

v.

R. C. LEE, Warden, Central Prison,
Raleigh, North Carolina,
Respondent-Appellee.

No. 02-5

ORDER

On the Respondent's Petition for Rehearing by the *en banc* panel, Judges Wilkinson, Niemeyer, Luttig, and Williams voted to grant the petition, and Chief Judge Wilkins and Judges Michael, Motz, Traxler, King, Gregory, and Shedd voted to deny the petition. The Petition for Rehearing is therefore denied. Judge Luttig wrote an opinion dissenting from the denial of the Petition for Rehearing.

Judges Widener and Duncan did not participate in the decision.

LUTTIG, Circuit Judge, dissenting from the denial of rehearing:

Timothy Lanier Allen murdered North Carolina State Trooper Raymond E. Worley in cold blood, by shooting him

three times at pointblank range -- once through the head -- and leaving him slumped over alongside the road, literally to drown in his own blood. For this murder, a jury of North Carolina citizens sentenced Allen to death. Now, almost nineteen years after Allen's murder of Trooper Worley and almost eighteen years after the jury of Allen's peers sentenced Allen for his crime, this court has invalidated Allen's sentence on nothing more than its unexplained speculation that some juror might have voted to sentence Allen differently had the jury not been instructed that it had to unanimously find the following inconsequential (if not affirmatively damaging) "mitigating" factors in order to consider them in sentencing Allen:

> Timothy Allen was only 30 years old when he murdered Trooper Worley.
>
> Timothy Allen's multiple previous convictions were only for shoplifting, breaking and entering, and burglary.
>
> Timothy Allen was raised in a single-parent home, by only his mother and grandmother.
>
> Timothy Allen is the father of three sons.
>
> Timothy Allen supported one of his three sons.
>
> Timothy Allen "remained employed" when he was not in prison.
>
> Timothy Allen's parents had a fight at Allen's third birthday party.

This, in the face of the fact that the jury did find unanimously the three contrastingly *nonfrivolous* mitigating factors that

Allen had genuine remorse for the murder; that he had achieved while incarcerated; and that he had no history of crime involving deadly weapons, *and nonetheless decided to sentence Allen to death, given the heinousness of his murder of Trooper Worley.*

Not only does the majority's decision defy common sense and insult the men and women who served on the jury in this case, it so distorts the harmless error inquiry required of federal courts conducting habeas review under *Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*, as to render that inquiry all but meaningless in future cases. It is for these reasons that I dissented from the court's judgment on the *McKoy* issue when the *en banc* decision issued (in abbreviated form because of the court's extraordinary delay in deciding the case). *See* Slip Op. at 53-55 (4th Cir. 2004). It is for these reasons that I dissent now, with full opinion, from the denial of rehearing with respect to that judgment.

I.

Despite the fact that *en banc* reargument took place in this case almost a year ago and the deadline for deciding this case had long since passed by the time it issued its opinions, the court failed to produce an opinion clearly explaining to the State of North Carolina its reasons for setting aside the death sentence that the jury of North Carolina citizens imposed eighteen years ago. Instead, the court produced a fractured array of opinions including, most notably, a plurality opinion authored by Judge Gregory on the issue presented under *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*, which does not even attempt the harmless error analysis required of an appellate court by *Brecht*.

The plurality does not even purport to undertake the carefully reasoned, "individualized" reweighing of the aggravating and mitigating circumstances, against the backdrop of the specific record facts of the crime committed, which is

required under *Brecht*. Instead, in a few pages that appear as afterthought in attempted justification of a result mistakenly reached before the court even understood that it was required to undertake the *Brecht* inquiry prior to granting the writ of habeas corpus, the plurality lists the aggravating circumstances in sterilized form, admittedly divorced from the actual circumstances of Allen's crime; lists the above-recited mitigating circumstances; recites only that evidence from the record that supports these mitigating circumstances, while ignoring any contrary evidence; strings together quotations from the applicable precedents; and then asserts in classic *ipse dixit* that a juror could find "any one" of the listed factors (aside from two which are so frivolous even the majority cannot bring itself to rely on them) and on the strength of that single factor decide against imposition of the death penalty. Thereafter, in empty incantation of the language from the authorities it string cites, it simply states that it cannot say with fair assurance that the jury would not have sentenced Allen differently had it been properly instructed that it could consider the mitigating circumstances listed.

With that, and nothing more, the plurality sweeps away the sentence imposed on Allen by the citizens of North Carolina almost two decades ago. Such a substantively meaningless harmless error review betrays that the court has yet to give any more thought to the question of the harmfulness of the instructional error in this case under *Brecht* than the original panel had given the question at the time that it filed its opinion granting the writ of habeas corpus without so much as a mention of *Brecht* or, for that matter, even of the requirement for harmless error review under *Brecht* before a writ of habeas corpus may be granted in cases such as this. *See Allen v. Lee, 319 F.3d 645, 656-58 (4th Cir. 2003).*

A.

In order to hold, as the plurality does here, that a faulty jury instruction had a "substantial and injurious effect or influence on the jury's verdict" sentencing a defendant to death, "the court must determine what the sentencer would have done absent" the error. *Stringer v. Black, 503 U.S. 222, 230-31, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992)*. Thus, the court *must* compare (1) the aggravating and (2) mitigating evidence which the jury did consider, (3) to the particular evidence which the jury was prevented by the faulty jury instruction from considering and (4) then analyze whether, and to what extent, that evidence would have affected or influenced the verdict eventually reached by the jury. *See, e. g., Boyd v. French, 147 F.3d 319, 327-28 (4th Cir. 1998)*; *Horsley v. Alabama, 45 F.3d 1486, 1492-93 (11th Cir. 1995)*. The Supreme Court could not have been any clearer that, in conducting this analysis, "what is important ...is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. " *See Barclay v. Florida, 463 U.S. 939, 958, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983)* (emphasis in original) (instructing state courts conducting harmless error analysis at the sentencing stage of capital trials).

Despite the simplicity of this analytical framework and the clarity of the Supreme Court's directive, the plurality does not even purport to make "individualized" findings of the kind mandated by the Supreme Court -- none.

Nowhere in its opinion does the plurality even describe the actual circumstances of Allen's murder of Trooper Worley, without which it is not even possible to begin to conduct *Brecht's* harmless error inquiry.[3]

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[3] Even as to the statutory aggravators, the plurality says no more than that the crime was "terrible," and that these aggravators were "exacerbating." Slip Op. at 44-45.

Nowhere in its opinion does the plurality discuss even a single one of the five mitigating factors that were foreclosed from the jury's consideration, each one of which the plurality deems to be "colorable" in its reasonable potential to affect the jury's sentencing decision. And it only selectively recounts the evidence from the record that would support these factors, omitting altogether the substantial record evidence that undermines the mitigating quality of the little evidence that it does recount.

Needless to say, nowhere in its opinion does the plurality even purport to assess the effect that any single one of the foreclosed mitigating factors would have had, when balanced against the true weight of the aggravating factors that supported the jury's sentence of death; the plurality simply states, without even a sentence of reasoning aside from conclusory statements about the ways in which these factors highlighted Allen's "redeeming qualities," that "any one" of the five mitigating factors may have swayed the jury's verdict, Slip Op. at 45 -- necessarily including, for example, the factors that the defendant "remained employed when not incarcerated" and that Allen's parents had a fight at his *third* birthday party, twenty-seven years prior to his murder of Trooper Worley.[4]

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[4] Chief Judge Wilkins, in his separate concurring opinion, does not, himself, repeat the sweeping statement that "any one" of the foreclosed mitigators might have supported a vote in favor of a life sentence. In his opinion, Judge Wilkins rests instead on the argument that "[a] reasonable juror could have concluded that Allen should be spared from the death penalty so that his children would not lose their father." Slip Op. at 19. Although this may be thought a narrower argument and opinion for purposes of this case, than the plurality's argument and opinion, which Judge Wilkins inconsistently joins, this argument is in actuality the most far-reaching and detrimental argument for our court's future harmless error jurisprudence of any made by any member of the court in this case.

And, although it would perhaps go without saying, given that the plurality does not even describe the crime for which Allen was convicted and sentenced, nowhere in its opinion does the plurality even attempt to balance any of the aforementioned mitigating and aggravating factors together with the particulars of the crime committed by Allen.

Confirmation of the fact that the plurality undertakes no balancing of the mitigating circumstances that it holds could support a different verdict, against the aggravating factors, is found in the completely opposite treatment that it accords two mitigating factors that it holds would not have affected the jury's verdict. With respect to the submitted mitigating factor regarding Allen's age, for example, the court undertakes a full and analytically sound discussion, ultimately concluding that "a person of thirty cannot reasonably be characterized as too young to appreciate the seriousness of his crime," and therefore that no reasonable juror would have voted to spare Allen's life on the basis of Allen's age. *See* Slip Op. at 43. Absent is any such discussion of even one of the mitigating factors that the plurality holds *could* have substantially swayed the jury's verdict.

That the plurality does not meaningfully discuss even a single one of these relevant considerations -- a detailed discussion of each of which is essential to the *Brecht* analysis -- itself confirms that its disposition not only is not, but could not possibly be, based on a reasoned reweighing of the aggravating and mitigating factors in light of the entirety of the record facts, as required under *Brecht*. Rather, the plurality ultimately conducts its harmlessness analysis as if in a funhouse mirror, with the aggravating factors minimized to a fraction of their true size due to the plurality's failure even as much as to describe Allen's crime, and the mitigating factors magnified to a multiple of their size due to the plurality's selective recitation of the record evidence. These distortions alone, which are

hopelessly unfaithful to "the individualized treatment" that is required, render the plurality opinion unmistakably in conflict with Supreme Court precedent.

B.

But the plurality's conclusory holding of harm *under the peculiar facts of this case* produces an opinion even more fundamentally flawed than one that simply fails to make the required "individualized" weighing of the respective aggravating and mitigating factors in light of the totality of the record facts. The core of the plurality's explanation that the faulty jury instruction resulted in "actual prejudice" to Allen, such as it is, reads in full as follows:

> Even if eleven jurors agreed that five non-unanimous mitigating factors were present, under the unconstitutional jury instruction they could have found *no* additional mitigating circumstances. Thus, instead of those eleven jurors weighing eight mitigating circumstances against the two aggravating factors, they were only permitted to weigh the three mitigating circumstances on which they were unanimous. Recognizing that all aggravating and mitigating factors do not warrant the same weight, and that jury deliberations are an inexact science at best, this means that a possible fifty-five additional votes (eleven jurors times five factors) could have been cast in favor of mitigation. *Any one of these fifty-five possible votes could, in turn, have formed the basis for a decision against the imposition of the death penalty*. When the substantial evidence presented is evaluated in light of the broad discretion conferred on jurors in capital sentencing proceedings, we find ourselves unable to say, as we must to uphold a sentence of death, that *none*

> of the jurors would have been persuaded to vote for life imprisonment instead. After all, it only takes *one hold-out juror* to prevent the imposition of the death penalty, and, in this case, we cannot say with 'fair assurance' that no juror would have been swayed by the mitigating factors that the jurors were unlawfully precluded from individually considering, including the highly discretionary catch-all factor, particularly when combined with the unanimously found mitigating factors.

Slip Op. at 45-46 (emphases added).

It is clear from these paragraphs that the plurality does not merely fail to rest its conclusion of harm on "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." It rests its conclusion exclusively on the polar opposite of the individualized determination required -- a *generalized* view that *any* mitigating factor foreclosed from jury consideration, if not obviously frivolous (like Allen's age), is *per se* substantially injurious to the jury's verdict under *Brecht*, because *any* one juror could conceivably find *any* one such mitigating factor and, on the basis of that factor, refuse to sentence the defendant to death. In other words, the plurality rests its conclusion on the premise that jury deliberation is a game of random chance, that jurors are entitled to base their votes on considerations other than the evidence -- even irrational considerations, in this case such as that Allen's parents fought at his third birthday party, twenty-seven years ago -- and thus that any factor that is foreclosed from the jury is necessarily prejudicial. That this is the underlying rationale of the plurality's opinion is clear from its concluding observation that "it only takes *one hold out juror* to prevent the imposition of the death penalty," coupled with its earlier pronouncement that "*any one* of the[]fifty-five

[potentially foreclosed] votes could, in turn, have formed the basis for a decision against the imposition of the death penalty." Slip Op. at 45-46 (emphases added).[5]

This is rejection of the reasoned decision required of an appellate court under *Brecht* when reviewing for the harmfulness of an instructional error such as that in this case.

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[5] So as to leave no doubt as to its holding in this regard, the plurality even showcases three cases in which North Carolina juries sentenced defendants to life imprisonment even though their crimes were especially heinous and shocking to the public conscience, including (i) one in which a defendant had been convicted of first-degree murder after killing a victim during the course of a rape, see State v. McKinnon, 328 N.C. 668, 403 S.E. 2d 474, 475 (N.C. 1991); (ii) one in which a defendant had been convicted of first-degree murder after he enticed a victim away from a shopping mall, forced her at knife-point to perform oral sex on him, and then stabbed her repeatedly, see State v. Franklin, 308 N.C. 682, 304 S.E. 2d 579, 580-82 (N.C. 1983); and (iii) one in which a defendant had been convicted of firstdegree murder after stabbing his wife to death in front of the couple's children, see State v. Wilds, 133 N.C. App. 195, 515 S.E. 2d 466, 472 (N.C. App. 1999). In fact, of course, the plurality actually has no idea whether the sentences imposed in the cited cases are examples of irrational jury behavior, as opposed to rational jury behavior. The published opinions to which the plurality cites report only the circumstances of the crime committed and the additional fact that a life sentence was imposed; they report nothing about the mitigating circumstances presented to the jury, and, therefore, nothing about the weighing process in which the jury ultimately engaged in order to reach the decision to impose only a life sentence. Thus, it is impossible to assess whether the juries in these cases were acting rationally or irrationally.

The plurality's citation to these cases is telling, however, for this reason. The plurality actually provides, through its parenthetical descriptions, more detail about the aggravating circumstances in these irrelevant cases than it provides about the aggravating circumstances in the one case that is relevant -- the case presently before the court -- a curiosity that is symbolic of the fundamental flaw in the plurality's opinion in this case, that it never even attempts the individualized reweighing of the aggravating and mitigating factors required under Brecht.

This approach cannot possibly be squared with the Supreme Court's admonition to federal courts conducting habeas review that, "the State is not to be put to [the] arduous task" of resentencing a defendant, "based on mere speculation that the defendant was prejudiced by trial error." *Calderon v. Coleman, 525 U.S. 141, 146, 142 L. Ed. 2d 521, 119 S. Ct. 500 (1998)* (per curiam). Neither can it be defended in light of the explicit instruction in *Kotteakos v. United States, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*, the very precedent from which the *Brecht* standard was derived, that, when assessing the probable effect of an error, the court must not assume generally that the jury would act without reason. *Kotteakos, 328 U.S. at 764.*

II.

Faithful application of the *Brecht* harmlessness standard in this case can only yield the conclusion that the instructional error here was harmless. Weighing the specific aggravating factors of Allen's brutal murder of Trooper Worley with the overall circumstances of the crime, against the inconsequential, and only thinly-supported mitigating factors that were foreclosed from the jury's consideration, and weighing these together with the mitigating factors that were unanimously found to exist but unanimously found *not* to outweigh the aggravating factors, there is a remote possibility (if any at all) that Allen's jury would have voted to spare Allen's life had they not been foreclosed from consideration of the remaining mitigating factors at issue. Such a remote possibility does not begin to satisfy *Brecht's* requirement that the error have had a "substantial and injurious effect on the jury's verdict." *See Calderon, 525 U.S. at 146.*

A.

As I have noted, the plurality does not even believe that the facts surrounding Trooper Worley's murder are relevant to the

Brecht analysis, a belief which, by itself, stands in testament to the fact that it has not undertaken the analysis required of us. But those facts are as follows. On May 11, 1985, in the midst of an interstate crime spree, Allen pulled up behind the patrol car of North Carolina State Highway Trooper Raymond E. Worley in a stolen van. Trooper Worley had, only moments earlier, stopped a different stolen van -- a vehicle that Allen himself had helped to hot-wire and steal -- driven by Antonio Worrell, one of Allen's partners in the crime spree. After escorting Worrell into his patrol car, Worley motioned for Allen to exit from the stolen van that he was driving and approach the patrol car, which Allen did. Unbeknownst to Trooper Worley, however, Allen was armed, and, when Trooper Worley reached to unlock the patrol car door for him, Allen fired three shots at Worley at point blank range, once through the head. Allen and Worrell then left Worley on the side of the highway, slumped over in the patrol car. Literally drowning to death in his own blood, Worley died some four minutes later, leaving his wife without a husband and his two children without a father.

It was with this particular crime in mind, which the North Carolina Supreme Court described as "coldblooded, unprovoked, and unjustified," *State v. Allen, 323 N.C. 208, 372 S.E. 2d 855, 871 (N.C. 1988)*, that the jury unanimously found that the two aggravating factors of the murder of a law enforcement officer while he was engaged in the performance of his official duties and murder committed for the purpose of avoiding lawful arrest, had been proven beyond reasonable doubt. J.A. 102-03. It was with this particular crime in mind that the jury unanimously found that those mitigating factors that it *had* unanimously found -- that Allen had expressed remorse for the murder, that Allen had earned a GED while incarcerated, and that Allen had no history of crime involving deadly weapons -- were *insufficient* to outweigh the vileness of the murder Allen had committed, and accordingly imposed the

death penalty. And it is with the details of this crime in mind that we must, in conducting harmlessness review under *Brecht*, assess the likelihood that any of the jurors would have voted to spare Allen's life, had they not been instructed that they could only weigh mitigating circumstances that they had unanimously found to exist.

B.

The plurality believes that, because "the jury's process was carefully circumscribed by statutory dictates, limiting deliberation to *two* aggravating factors, that the murder was committed for the purpose of avoiding a lawful arrest and that the murder was of a law enforcement officer while engaged in the performance of his official duties ...*there is no legal basis to weigh the overall circumstances of the crime outside these two factors.*" Slip Op. at 42 (emphasis added).

First, even if it were true that it is impermissible as a matter of law to consider the details of Allen's brutal crime "outside" the two aggravating factors that were submitted and unanimously found, jurors obviously would have considered the details of Allen's crime when assessing the *strength* of these two factors. Indeed, they were affirmatively required to do this, because they could not assess whether the aggravating factors in this case were "*sufficiently substantial* to call for the imposition of the death penalty," *see N.C. Gen. Stat. § 15A-2000(c)(2)* (2003) (emphasis added), or whether the aggravating factors "outweighed any mitigating circumstance *in a sufficiently substantial manner* so as to call for the death penalty," *see State v. Prevatte, 356 N.C. 178, 570 S.E. 2d 440, 486 (N.C. 2002)* (emphasis added), without assessing the evidence supporting the particular aggravating factors submitted.

Understanding that which the plurality does not, the judge who presided over Allen's sentencing instructed the jurors that they were to decide "from *all the evidence* what value to give

to each circumstance and then weigh the aggravating circumstances so valued, against the mitigating circumstances, so valued." J.A. 95 (emphasis added). Just as it would be impossible to assess how much mitigating weight should be accorded a factor such as Allen's "rearing in a single-parent home" without considering evidence of the role Allen's father played in Allen's life even after Allen's parents divorced, so also would it be impossible to assess how much aggravating weight should be accorded the factors "that the murder was of a law enforcement officer while engaged in the performance of his official duties" and "that the murder was committed for the purpose of avoiding a lawful arrest" without any consideration at all of (i) the reckless crime spree Allen and his friends had been enjoying before Trooper Worley pulled them over, which explains *why* Allen had a motive to kill in order to avoid the lawful arrest he feared, (ii) that Trooper Worley had pulled the van driven by Allen's friend Worrell over to the side of the road and had just escorted Worrell into his patrol car when Allen approached, which explains *why* it can be said that Trooper Worley was doing no more no less than performing his "official duties" when he reached, unsuspecting, to let Allen into his car, and (iii) that Allen thus took advantage of Trooper Worley's defenseless position to shoot him three times, once through the head, and then left him literally to drown in his own blood, which explains *what* "the murder ...of a law enforcement officer" would have meant to any reasonable juror who had already voted to find Allen guilty as charged of murdering Trooper Worley. Only with these details firmly in mind, details of which the plurality holds are irrelevant as a matter of law, could a juror possibly have begun to engage in any reasoned assessment of the strength of the aggravating factors that the state had submitted.

But, of course, it is *not* true that "there is no legal basis to weigh the overall circumstances of the crime outside the[] two

[aggravating] factors." *See* Slip Op. at 42.[6] In fact, as North Carolina statute makes perfectly clear, "in the [sentencing] proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment." *N.C. Gen. Stat. § 15A-2000(a)(3)* (2003). And all of the evidence that the jurors heard in the guilt determination phase of the case, including the medical examiner's testimony that, as a result of the wounds which Allen inflicted, "Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood," *State v. Allen, 323 N.C. 208, 372 S.E. 2d 855, 858 (N.C. 1988)*, and the testimony that Worley actually had a wife and two children whom Allen had deprived of a husband and father, was relevant to the assessment the jurors were *required* to make of the strength or weakness of any particular *mitigating* factor which they found to exist. It is for this reason, of course, that the trial court instructed the jury that it "must decide *from all the evidence* what value to give to each circumstance." J.A. 95 (emphasis added); *see also State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569, 590 (N.C. 1979)* (" The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death

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[6] There is one respect in which the plurality opinion can actually be considered an improvement of the panel opinion with respect to the aggravating circumstances. While Judge Gregory's plurality opinion now at least recites the literal language of the aggravating factors that were submitted to the jurors, Judge Gregory's panel opinion originally issued a writ of habeas corpus requiring Allen's resentencing without even reciting the literal language of the aggravating factors that were submitted to the jury and unanimously found. See Allen v. Lee, 319 F.3d 645, 656-58 (4th Cir. 2003). But, of course, as noted previously, the panel opinion did not even appreciate that the writ could not issue except upon a finding that the instructional error was harmless under Brecht.

penalty *upon a particular defendant for a particular crime."*) (emphasis added).

Ultimately, the inquiry under *Brecht* requires that we assess the effect that the error had on the reasonable juror during the sentencing proceedings *in this case*. Such a juror would *not* have either forgotten or ignored the details of the heinous crime Allen committed, for the conviction of which that very juror had himself just voted during the guilt phase of Allen's trial. And as the foregoing paragraphs demonstrate, neither would such a juror have in any way been legally foreclosed from considering the details of this crime when assessing the weight to give each of the submitted aggravating and mitigating factors in order to determine whether Allen should live or die *for the particular crime he had committed*. To the contrary, the jury was charged by the judge to make precisely such an assessment "*from all the evidence.*" J.A. 95 (emphasis added). The jury having been so charged, it is no more justifiable now for the plurality to ignore the details of Allen's crime while deliberating over whether Allen's sentence should be vacated, than it would have been for a juror to ignore the details of Allen's crime, while deliberating over the sentence Allen deserved.

C.

While, alone, the plurality's refusal to consider the particulars of Allen's crime in the course of reversing Allen's sentence is fatal to its finding of non-harmlessness under *Brecht*, the individual weakness of each of the foreclosed mitigating factors underscores even further the magnitude of the plurality's error in this case.

As, the plurality itself reluctantly is forced to acknowledge, neither the first nor second foreclosed mitigating factors, that Allen "had no significant history of prior criminal activity" and that Allen was thirty years old at the time that he murdered

Worley, could reasonably have been considered sufficiently mitigating by a juror as to warrant life imprisonment rather than death, in light of the aggravated nature of Allen's murder of Worley. J.A. 100.

As to the first of these mitigating factors, Allen's criminal history record is not one that would prompt thought of mitigation. The record discloses that Allen had multiple prior convictions, for shoplifting, breaking and entering, and two counts of second degree burglary, R. 3362.

Neither would the second mitigating factor, Allen's age, lead any juror to vote for a life sentence for Allen. Indeed, at the time of the murder, Allen was neither juvenile, nor elderly; rather, born to Petersburg, Virginia parents in 1955, Allen was, as noted, *thirty years old* at the time that he murdered Trooper Worley. It would, of course, be entirely irrational for a juror to consider this fact one in mitigation of the brutal murder of a state trooper while he was engaged in the discharge of his official duties.

The third foreclosed factor was that "Timothy Lanier Allen was reared in a single-parent home." J.A. 100. No more than the first two, would this mitigating factor ultimately be considered mitigating by a reasonable juror. Again, the plurality only recites that evidence from the record that would arguably support its finding that "substantial evidence" exists in the record on the basis of which a juror could find several of the mitigating factors; it ignores all of the contrary record evidence.

As to this mitigating factor, the plurality relates that Allen "only" saw his father three or four times a year after his parents divorced and until Allen entered sixth grade. Slip Op. at 44. The plurality omits to mention, however, that, although Allen's parents had divorced when Allen was three, Allen's father remained financially supportive and in close contact with his children after the divorce. R. 3130-31. In fact, Allen's mother testified, and the jurors in the sentencing proceeding heard, that

after Allen's mother moved with her children from Petersburg, Virginia, to Washington, D.C. (where Allen's father had relocated after the divorce) shortly before the start of Allen's sixth-grade year, Allen's father "was over to the house each and every other day to see the children and to see that they was minding, that they were in school, and were they getting their lessons, and if anything went wrong, he always chastised them." R. 3131. And, when Allen came of age to work, his father gave Allen and his first wife a job at the grocery store that Allen's father had established and owned. R. 3075. Thus, although the plurality would like to leave one with the impression that Allen did not have a strong male role model, such is anything but the case.

Additionally, Allen's mother testified that Allen had received a church education and had "plenty" while growing up. R. 3143-44. And as for the difficulties of "single-parent rearing," Allen's mother further stated that she did not raise her children alone; the children's grandmother lived with them at all times, and looked after them when Allen's mother was at work. R. 3127, 3129. The plurality mentions none of this obviously relevant evidence, even as it claims that "any one" of the five factors it deems "colorable" -- necessarily including Allen's "single-parent rearing" -- could have led a juror to vote for a life sentence.

In light of all of this evidence, and Allen's admission that he had suffered no physical abuse or neglect from his parents while growing up, R. 3087, it is unsurprising that the jury did not unanimously vote to consider Allen's rearing in a single-parent home to be a mitigating factor. It would have been affirmatively surprising for *any* juror to find that Allen's rearing should be accorded any mitigating weight at all in light of the specific crime that Allen had committed.

The fourth and sixth foreclosed mitigating factors were that "Timothy Lanier Allen is the father of three sons" and that

"Timothy Lanier Allen was a supporting parent of at least one of his children." J.A. 100. While it is true as a factual matter that Allen fathered three sons, Allen lived with exactly none of his offspring. And in the very mitigating factor submitted to the jury, he only claimed before the court to be a supporting parent of one of them. The juxtaposition of these two mitigating factors -- that Allen had three sons, but supported only one of them -- would more likely have evoked distaste than sympathy.

And even accepting for the sake of argument that the evidence of Allen's close relationship with his eldest son is the most relevant mitigating evidence the jury was precluded from considering, the possibility that a juror would have spared Allen's life on the strength of this relationship is at best remote, in light of the fact that Allen himself took the life of not only a husband, but a father of two children, when he left Trooper Worley mortally wounded, all in a vain attempt to escape responsibility for the senseless crime spree on which Allen had embarked. R. 1259.

The fifth foreclosed mitigating factor was that "Timothy Lanier Allen remained employed during the times he was not incarcerated." J.A. 100. Obviously this provides an exceedingly uncomfortable basis for mitigation. The very statement of this factor is an unsettling reminder to the jury that there were other periods in Allen's life during which he was doing time in prison for other crimes, precisely the kind of evidence that would, if anything, reinforce the jury's considered sentencing conclusion. It is for *this* reason that "the dissent [did] not contest" whether or not Allen truly was able to "remain[] employed when he was not incarcerated" *see* Slip Op. at 44, not for any reason from which the plurality should draw encouragement.

The seventh factor not considered by the jury was the catch-all, "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." J.A. 101. As with every other of the mitigating factors, the

majority refrains from stating that any juror would have been likely to rely on this factor in voting for a life sentence. But it recites the following as evidence that might have been considered under this catch-all:

> Allen presented substantial evidence that his parents engaged in physical fights in his presence, which petrified him. In fact, their ultimate separation and divorce resulted from one such fight that occurred during Allen's third birthday party in which the police were called. Similarly, the jury heard evidence that Allen was a shy, timid person, bullied by others, who did not use firearms, and was unwilling or unable to fight back. And although Allen was never physically abused as a child, from an early age he lost himself in alcohol and drugs.

Slip Op. at 44.

None of this evidence would have remotely influenced a reasonable juror to spare Allen's life. It denigrates the seriousness of Allen's offense for the majority even to intimate that, for example, a juror would have found that a fight that occurred between Allen's parents at Allen's *third* birthday party, twenty-seven years before he murdered Trooper Worley, or that Allen was "shy" would be relevant to Allen's culpability in taking the life of Raymond Worley, much less sufficiently dispositive to warrant a life sentence.[7] Obviously, Allen's does

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[7] Suffice it to say, the plurality also dramatically overstates the value of the testimony that Allen was a "shy, timid person ...,[who] was unwilling or unable to fight back." Slip Op. at 44. This testimony was not uncontroverted. The state expressly rejected the characterization of Allen as a "shy, timid person" at sentencing, and with good reason. *See* R. 3284-85. The very circumstances of Allen's murder of Trooper Worley - and the crime spree that precipitated it - serve to refute a description of the

not even begin to approach the type of "nightmarish" childhood that might have led a juror to believe Allen had no option but to lead a life of violence and self-destruction that ultimately culminated in the murder of which Allen was convicted. *Williams v. Taylor, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*. It bears repeating that Allen testified that he had suffered no physical abuse or neglect at his parents' hands, and that his parents got along most of the time when they were together. *Compare Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471 (2003)* (" Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case."); *Williams, 529 U.S. at 395* (revealing that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings," and that "Williams had been severely and repeatedly beaten by his father").

In fact, although I am sure she hoped, as would any mother, that the jurors would spare her son's life, I doubt even Allen's own mother would have agreed with the plurality's claim that Allen's childhood ought be considered mitigating with respect to the terrible crime Allen had committed. Such, indeed, is the only inference one can reasonably draw from the following colloquy which occurred between one of the prosecutors and Allen's mother at the sentencing proceedings, and which the jurors charged with sentencing Allen heard:

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defendant as "shy and timid," as do his numerous, prior criminal convictions for breaking and entering and for burglary. And this very example shows yet another way in which evidence of the circumstances of Allen's crime, which the plurality refuses even to acknowledge, is *essential* to any candid assessment of the weight of the mitigating evidence submitted.

Q. Did you have occasion to talk with [Allen] about this stealing people's things -

A. Yes.

Q. Anytime?

A. Yes.

Q. What did you tell him about stealing people's things?

A. What doesn't belong to him, he was taught never to put his hand on nothing that did not belong to him.

Q. How about -

A. *Because he had no reason to do any of that if he done these things he had no reason to do it. We had plenty and he had no reason to have to go to any of that.*

R. 3142-43 (emphasis added).

D.

Aware of the weakness of each mitigating factor individually, the plurality attempts to buttress its reasoning by emphasizing "the possible *cumulative* impact of the additional mitigating factors." Slip Op. at 46 (emphasis added). Thus, the plurality hedges its reliance on the bold statement that "any one" of the five foreclosed factors might have supported a vote for a life sentence with the fall-back position that "even if a juror might not have found that each of those additional factors independently outweighed the aggravators, a reasonable juror

well could have concluded to the contrary when considering those factors *collectively, and in addition* to the three unanimously found mitigators." *Id.*

This is nothing more than unabashed speculation of the kind that the Supreme Court has admonished cannot justify putting the state to the arduous task of resentencing at any time, let alone eighteen years after a jury has rendered its verdict. *See Calderon, 525 U.S. at 146.* Having never even attempted to assess the weight of the aggravating factors, and having never candidly assessed the strength of the individual mitigating factors, the plurality actually has no idea what cumulative impact the foreclosed mitigators would have had, if not for the impermissible unanimity instruction. But the nature of Allen's crime, and the strength of the aggravators that the state submitted and the jurors did unanimously find, make it highly improbable that a juror would have been persuaded to spare Allen's life even by the cumulative impact of all the foreclosed mitigators.

E.

In sum, on this record, actually balancing the aggravating and mitigating factors against the backdrop of the record facts of Allen's cold-blooded murder of Trooper Worley, *which the plurality never even attempts to do*, no judge could claim that the instructional error in this case had a "substantial and injurious effect" on the jury that sentenced Allen to death.

III.

With good reason unwilling to join in the plurality's untenable finding of a "substantial and injurious effect," Judge Traxler rests decision on the narrower ground of "grave doubt," concluding that the evidence is "in 'virtual equipoise as to the harmlessness of the [*McKoy*] error.'" Slip Op. at 26-27. While even Judge Traxler's conclusion is ultimately unpersuasive in light of the palpable weakness of both the mitigating factors

themselves and the evidentiary support for these factors, and the contrasting strength of the aggravating circumstances, one can hardly help but be struck by the many ways in which Judge Traxler's opinion confirms the indefensibility of the plurality's opinion, and thus the precariousness of the majority's judgment. Among other things, clearly understanding the plurality's error in refusing even to describe the circumstances of Allen's crime, Judge Traxler describes those circumstances in detail, up to and including the medical examiner's statement that because of the mortal wounds Allen had inflicted, "Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood." *Compare* Slip Op. at 34-49 (plurality opinion) (never once describing the circumstances of Allen's crime) *with* Slip Op. at 20-22 (Traxler, J., concurring in the judgment) (setting forth a detailed description of the evidence of Allen's crime which the jurors heard during the guilt phase of the trial). Second, Judge Traxler notes and incorporates into his analysis the fact that Allen was raised by his mother and his grandmother, who lived with the family at all times, a fact that the plurality entirely omits in holding that Allen's "single-parent rearing" could be relied upon to sentence Allen to life rather than death. *Compare* Slip Op. at 43-44 (plurality opinion) (explaining that "Allen offered evidence that from the time he was a young boy he was raised in a single-parent home," but nowhere acknowledging that Allen's grandmother helped raise him) *with* Slip Op. at 27 (Traxler, J., concurring in the judgment) (acknowledging that Allen was reared "by his mother and grandmother"). Third, Judge Traxler acknowledges and incorporates into his analysis Allen's own mother's testimony at sentencing that Allen had "plenty," testimony that the plurality refuses even so much as to cite. *Compare* Slip Op. at 43-45 (plurality opinion) (stating that Allen had "exhibited some redeeming qualities - including efforts to overcome a less than ideal childhood," while omitting to recite the testimony of Allen's mother that Allen "had plenty

and he had no reason to have to go to any of that") *with* Slip Op. at 27 (admitting that "Allen's mother testified that Allen received a church education and had 'plenty'"). And finally, flatly rejecting the plurality's holding that "any one" of five mitigating factors might have influenced a juror to spare Allen's life, Judge Traxler concludes only that the evidence as to the harmlessness of the error is in "equipoise." *Compare* Slip Op. at 45-46 (plurality opinion) (" Any one of the[] fifty-five possible [but foreclosed] votes could, in turn, have formed the basis for a decision against the imposition of the death penalty.") *with* Slip Op. at 26-27 (Traxler, J., concurring) ("Although I cannot say with certainty that the unanimity instruction had a substantial and injurious effect or influence on the verdict of death, the nature of the error in this case unquestionably leaves me in grave doubt as to whether it was in fact harmless.").

In effect, the juxtaposition of Judge Traxler's analysis with the plurality's conclusory findings all but confirms to any reader the untenability of the conclusion that the *McKoy* error in this case was harmful.

Indeed, himself uncertain even about his tentative conclusion that the mitigating evidence is enough to produce "grave doubt" about the harmlessness of the error, Judge Traxler adds an alternative rationale for his finding of "grave doubt," a prediction that had the North Carolina Supreme Court itself recognized the error in its reliance on the jury poll, it likely would not have engaged in any reweighing of the evidence proffered during the sentencing phase. Rather, Judge Traxler concludes, that court would have presumed that because the existence of at least some of the mitigating factors submitted by Allen were supported by evidence, the *McKoy* error was not harmless. From this prediction, Judge Traxler contends, "it seems perverse that we ... consider denying habeas relief from a North Carolina death sentence imposed under North Carolina's death sentencing scheme because we believe,

based upon *our* 'reweighing' of the evidence under *Brecht*, that it should be upheld in the face of knowing that the North Carolina Supreme Court *did not* find the *McKoy* error harmless for that reason under the *Chapman* [v. *California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967),*] standard and *would not* have performed such a reweighing itself." Slip Op. at 29 (Traxler, J., concurring in the judgment) (emphases in original).

Though Judge Traxler purports to be aware of the difference between the North Carolina Supreme Court's application of *Chapman* (to decide on *direct review* whether a constitutional error was harmless) and our application of *Brecht* (to decide on *collateral review* whether a constitutional error was harmless *and therefore warrants the issuance of a writ of habeas corpus), see* Slip Op. at 30, he fails to recognize that this difference is fatal to his argument. What Judge Traxler alludes to, but nowhere explicitly states, is that the *Chapman* standard, which is the standard applied by the North Carolina Supreme Court in all of the cases to which Judge Traxler cites, is a much higher standard for harmlessness than *Brecht*. While *Chapman* requires proof "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *386 U.S. at 24*, for the error to be declared harmless, *Brecht* only requires the court to assure itself that the error did not have "substantial and injurious effect or influence in determining the jury's verdict," *Brecht, 507 U.S. at 623*. The difference between these harmlessness standards is no mere accident. In fact, the Supreme Court in *Brecht* explicitly adopted a less stringent standard for harmlessness (and, thus, a corresponding more stringent standard for harmfulness) in the context of collateral review, explaining that "application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Id*. Thus, application of a less onerous harmlessness standard on collateral review, and not the application (which Judge Traxler in this case alternatively advocates) of the same harmlessness

methodology the state court would likely have applied, *is* the mechanism through which the Supreme Court has instructed federal courts to show "comity and respect for the state courts." Slip Op. at 46 (Traxler, J., concurring in the judgment).

The reason why the difference between *Brecht* and *Chapman* is fatal to Judge Traxler's claim is this: Because of that difference, as the Court emphasized in *Brecht*, '" an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id. at 619* (quoting *United States v. Frady, 456 U.S. 152, 165, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982)).*

In this case, thus, it can be assumed *arguendo* that the North Carolina Supreme Court would have ordered resentencing had *it* both recognized that the jury poll does not reveal anything about how the individual jurors would have voted and then reached a conclusion that the *McKoy* error was harmful under *Chapman* after eschewing any reweighing of the evidence. But *we*, while conducting collateral review, are still constrained to deny relief, because the error by any reasonable standard *must* be considered harmless under *Brecht*.

Ultimately, therefore, what Judge Traxler views as "perverse" is nothing more than a logical consequence of the fact that the *Brecht* standard allows more errors to be declared harmless than does the more stringent standard under *Chapman* v. *California*.

IV.

Under *Brecht* v. *Abrahamson*, a federal court setting aside a sentence of death owes the state court system and the jurors that reached that determination a detailed explanation of the reasons why a reasonable juror would have been swayed by the evidence she was precluded from considering, no less than the court owes the same to a defendant when it concludes that a constitutional error is harmless and denies to him the opportunity to be re-sentenced by a jury, *see Clemons v. Mississippi, 494 U.S. 738, at 753-54, 108 L. Ed. 2d 725, 110 S. Ct. 1441.*

Instead of the detailed, reasoned explanation required under *Brecht*, the plurality has offered only conclusory statements bereft of any analysis or even discussion, in justification of the court's order releasing Allen from the death sentence imposed for his cold blooded murder of Trooper Worley. In place of the reasoned weighing of mitigating factors and aggravating circumstances that is required by *Brecht*, and that until today has been required by this Circuit, it has attempted to substitute a glib standard premised impermissibly on the fact of occasional random or irrational juror conduct. And in place of studied attention to the individualized circumstances of a petitioner's life and the particular circumstances of his crime, it has substituted attention to such frivolous details as that a fight might have occurred between parents at a birthday party as many as twenty-seven years before the crime in question was even committed.

An opinion that flouts more conspicuously the Supreme Court's decision in *Brecht* v. *Abrahamson* one would be hard-pressed to imagine. For these reasons, I dissent.

APPENDIX B

Filed: April 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY LANIER ALLEN,
Petitioner-Appellant,

v.

R. C. LEE, Warden, Central Prison,
Raleigh, North Carolina,
Respondent-Appellee.

No. 02-5

Before WILKINS, Chief Judge, and WIDENER, WILKINSON, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, KING, GREGORY, and SHEDD, Circuit Judges.

Affirmed in part and dismissed in part by published opinion. Judge Gregory wrote the opinion for the court in Parts I, II, III, and IV, in which Chief Judge Wilkins and Judges Wilkinson, Niemeyer, Williams, Michael, Motz, Traxler, King, and Shedd joined. Judge Luttig wrote a separate opinion concurring in the judgment entered in those parts. Judge Niemeyer wrote the opinion for the court in Part V, in which Chief Judge Wilkins and Judges Wilkinson, Williams, Traxler, and Shedd joined. Judge Luttig wrote a separate opinion concurring in the judgment entered in this

part. Judge Gregory wrote a separate opinion dissenting from Part V, in which Judges Michael, Motz, and King joined.

Reversed on the McKoy issue by a per curiam opinion, in which Chief Judge Wilkins and Judges Michael, Motz, Traxler, King, Gregory, and Shedd concurred. Chief Judge Wilkins wrote a separate opinion concurring in the judgment on this issue, in which Judge Motz joined. Judge Traxler wrote a separate opinion concurring in the judgment on this issue, in which Judge Shedd joined. Judge Gregory wrote a separate opinion concurring in the judgment on this issue, in which Chief Judge Wilkins and Judges Michael, Motz, and King joined. Judge Niemeyer wrote a separate opinion dissenting from the judgment on this issue, in which Judge Wilkinson joined. Judge Luttig wrote a separate opinion dissenting from the judgment on this issue. Judge Williams wrote a separate opinion dissenting from the judgment on this issue.

Judge Widener heard oral argument in this case but later recused himself and did not participate in the decision. Judge Duncan did not participate in this case.

PER CURIAM, announcing the judgment of the court:

Timothy Lanier Allen was convicted of first-degree murder in a North Carolina court and sentenced to death. Following exhaustion of his rights of review in the North Carolina courts, Allen filed a petition for a writ of habeas corpus in the district court. The district court denied all relief and certified the appealability of several issues. *See 28 U.S.C. § 2253(c).*

On appeal, Allen contends (1) that the short-form indictment used by the State was unconstitutional; (2) that the prosecution withheld, in violation of *Brady v. Maryland,*

373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), jail records that indicated Allen was receiving daily doses of anti-withdrawal medication; (3) that the error in the jury verdict form and jury instructions during the sentencing phase of Allen's trial, which the North Carolina Supreme Court had found to be error but harmless error under *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*, was in fact not harmless error; and (4) that Allen made a *prima facie* showing that his rights under *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)* (prohibiting the prosecution from using peremptory challenges in a racially discriminatory matter), were violated during jury selection in his State trial and that a *Batson* hearing should be held. Having heard this appeal *en banc*, the court decides as follows on each of these issues:

For the reasons given in Parts I-IV of the opinion written for the court by Judge Gregory, the court denies a certificate of appealability with respect to Allen's first claim and dismisses that claim, and the court affirms the district court with respect to the second claim. Chief Judge Wilkins and Judges Wilkinson, Niemeyer, Williams, Michael, Motz, Traxler, King, and Shedd join in Parts I-IV. Judge Luttig wrote a separate opinion concurring in the judgment on these two claims.

For the reasons given in Part V of the opinion written for the court by Judge Niemeyer, the court affirms the district court on Allen's *Batson* claim. Chief Judge Wilkins and Judges Wilkinson, Williams, Traxler, and Shedd join in Part V. Judge Luttig wrote a separate opinion concurring in the judgment on this claim. Judge Gregory wrote a separate opinion, dissenting from Part V, in which Judges Michael, Motz, and King join.

With respect to Allen's claim under *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*, the court concludes that the district court erred in rejecting the claim. In *State v. Allen, 331 N.C. 746, 417 S.E. 2d 227 (N.C. 1992)*, the North Carolina Supreme Court held that the North Carolina trial court's instructions on unanimity given to the jury during the sentencing phase was "error pursuant to *McKoy*" but that the error was "harmless beyond a reasonable doubt." *Id. at 228*. The court holds that the North Carolina Supreme Court's conclusion that the *McKoy* error was harmless beyond a reasonable doubt resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, *see 28 U.S.C. § 2254(d)(1)*, and that the error was not harmless under *Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*. For this reason, the court vacates Allen's death sentence and remands this case to the district court with instructions to issue a writ of habeas corpus releasing Allen from a sentence of death, unless the State of North Carolina commences proceedings to resentence him within a reasonable time. Chief Judge Wilkins and Judges Michael, Motz, Traxler, King, Gregory, and Shedd concur in this judgment on the *McKoy* claim, and Judges Wilkinson, Niemeyer, Luttig, and Williams dissent from the judgment. Chief Judge Wilkins wrote an opinion concurring in this judgment, in which Judge Motz joins. Judge Traxler wrote an opinion concurring in this judgment, in which Judge Shedd joins. Judge Gregory wrote an opinion concurring in this judgment, in which Chief Judge Wilkins and Judges Michael, Motz, and King join. Judge Niemeyer wrote an opinion dissenting from this judgment, in which Judge Wilkinson joins. Judge Luttig wrote an opinion dissenting from this judgment. And Judge Williams wrote an opinion dissenting from this judgment.

GREGORY, Circuit Judge, writing for the court in Parts I through IV:

I

Timothy Lanier Allen, an African American, was tried and convicted of first-degree murder for killing Raymond E. Worley, a Caucasian North Carolina State Highway Patrol officer. At trial, the State used eleven of thirteen peremptory challenges against otherwise qualified African American members of the venire. Seven African Americans were seated on the jury, one of whom was later removed for cause during the trial. Allen's fate was finally decided by a jury of six African Americans and six Caucasians.

At sentencing, the jury was instructed, in part, that they should "unanimously" find from the evidence whether one or more mitigating circumstances were present. The jury unanimously found the existence of three mitigating circumstances, but concluded that these mitigating circumstances were insufficient to outweigh the aggravating circumstances, and therefore recommended the imposition of a death sentence. After reading the verdict, the court polled each juror. The court re-read the jury instructions requiring unanimity, and subsequently asked each juror if the jury's answers were "still your answers" and if each juror "still assented thereto." The jurors affirmed their recommendation of the death sentence, which the court imposed.

Allen appealed his conviction to the Supreme Court of North Carolina, which found no error in either the guilt or sentencing phases of Allen's trial. Allen subsequently appealed that decision to the Supreme Court of the United States, which vacated Allen's death sentence and remanded the case for consideration in light of *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227*

(1990) (holding that North Carolina's capital murder jury instruction requiring unanimity in finding mitigating circumstances was unconstitutional). On remand, the North Carolina Supreme Court found that the *McKoy* error was harmless beyond a reasonable doubt and reinstated the sentence. Primarily contending that the *McKoy* error should not be subject to harmless error analysis, Allen again appealed to the Supreme Court of the United States, which denied certiorari.

Allen then filed a habeas petition and a motion under *Fed. R. Civ. P. 59(e)* in the United States District Court for the Eastern District of North Carolina. The district court granted summary judgment for the government on Allen's petition for writ of habeas corpus, denied the *Rule 59(e)* motion, and granted a certificate of appealability on six claims. Allen now appeals three of the claims for which a certificate was granted and one claim for which certification was denied.

II

We review a district court's decision to grant or deny habeas relief *de novo. Booth-El v. Nuth, 288 F.3d 571, 575 (4th Cir. 2002)*; *Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 555 (4th Cir. 1999)*. On a claim for which the district court has not already granted a certificate of appealability, we must first determine whether "the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)*; *Slack v. McDaniel, 529 U.S. 473, 483, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*. To make such a showing, Allen must demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack, 529 U.S. at 484* (quoting *Barefoot v. Estelle, 463 U.S. 880, 893,*

77 L. Ed. 2d 1090, 103 S. Ct. 3383 & n.4, *463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983))*. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), once a certificate of appealability has issued, we may only grant habeas **[**10]** corpus relief if we find that the state court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1)*; *Frye v. Lee, 235 F.3d 897, 903 (4th Cir. 2000)* (citing *Williams v. Taylor, 529 U.S. 362, 402-03, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000))*. Interpreting the "unreasonable application" clause, the Supreme Court has made clear that a federal court may "'grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2534-35, 156 L. Ed. 2d 471 (2003)* (quoting *Williams v. Taylor, 529 U.S. at 413*). That is, "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Id. at 2535* (quoting *Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003))*.

III

In this appeal, Allen first asserts that the short-form indictment failed to allege each element of the crime of first-degree murder and any aggravating circumstance supporting the death sentence. He contends that these defects render his first-degree murder conviction and death sentence invalid under *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, and *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*. The district court denied Allen a certificate of appealability on this issue. As noted above, our first inquiry in reviewing this

denial entails determining whether Allen "has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)*; *Slack, 529 U.S. at 483*.

A short-form indictment alleging elements of common law murder is sufficient to inform the defendant of the charge against him, and thus satisfies the requirements of the *Sixth Amendment* and the *Due Process Clause*. *See, e.g., Hartman v. Lee, 283 F.3d 190, 192 (4th Cir. 2002)* (considering a challenge to a short-form indictment that is materially indistinguishable from that used in Allen's case). Because the short-form indictment does not raise a substantial constitutional question upon which reasonable jurists could disagree, we deny a certificate of appealability and dismiss this claim.

IV

Next, Allen asserts that the prosecution violated his rights under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, by concealing jail records indicating that he was given substantial daily doses of anti-withdrawal medication during the week following the crime.* Because the district court has issued a certificate of

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* Allen also argues that the state violated his rights under *Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)*, when the prosecutor failed to correct the testimony of Dr. William Brown, who testified that Allen was never given any anti-withdrawal medication. The North Carolina court found this claim procedurally barred because it was not raised in Allen's first Motion for Appropriate Relief. We find this claim procedurally defaulted because Allen failed to make a showing of cause and prejudice or actual innocence to establish a fundamental miscarriage of justice. *See Sawyer v. Whitley, 505 U.S. 333, 338-39, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)*. Furthermore, even if the claim was not procedurally defaulted, Allen's assertion would still fail because Dr. Brown only testified that *he* had not given Allen any medication, not that Allen *never* received any medication.

appealability, we proceed directly to the merits of Allen's claim.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id. at 87.* "Materiality under *Brady* means that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Fullwood v. Lee, 290 F.3d 663, 687 (4th Cir. 2002)* (quoting *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)).*

In Allen's case, the jail records are not material to a *Brady* challenge because Allen testified at trial that he was neither under the influence of illegal drugs nor experiencing withdrawal at the time of the murder. Thus, even if Allen had received anti-withdrawal medication, his own testimony nullifies what, if any, probative value the jail records would have as to guilt or punishment. Moreover, even if the records were material, Allen would not be entitled to relief under *Brady* if "the information sought is otherwise reasonably available." *Barnes v. Thompson, 58 F.3d 971, 976 (4th Cir. 1995).* That is, "'where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.'" *Id. at 975* (quoting *United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990)).* Because Allen had personal knowledge of any medications he might have received, his *Brady* claim is without merit. We therefore affirm the ruling of the district court.

NIEMEYER, Circuit Judge, writing for the court in this Part V:

V

Allen also contends that the State's use of peremptory challenges during jury selection was tainted with racial bias, in violation of *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)*, and that he is entitled to have his conviction and sentence vacated unless the State proffers race-neutral explanations for its conduct during jury selection almost twenty years ago. Allen is an African-American, and Trooper Worley, whom he was convicted of murdering, was white.

During jury selection, 65 venirepersons were called for consideration as potential jurors, of which 24 were African-Americans. The State exercised 13 peremptory challenges in selecting the trial jury panel and two alternates, leaving unused three challenges available to it. During the process, the State accepted 7 African-Americans and exercised peremptory challenges against 11 African-Americans. The jury as empaneled consisted of seven African-Americans and five whites, and the two alternates were white. Later during the trial when one of the African-Americans on the jury was excused, the court replaced her with the first alternate so that the case was ultimately decided by a jury of six African-Americans and six whites.

The record of the trial indicates that the jury-selection process was careful, deliberate and rational, and all of the questioning by the attorneys and the rulings by the court focused on the appropriate criteria for picking a fair and impartial jury. The process began by seating 12 venirepersons in the jury box on November 4, 1985, and having the lawyers question those jurors as a group and individually. The original panel, selected at random,

consisted of five African-Americans and seven whites. As each juror was excused either for cause or as the result of a peremptory challenge, another venireperson was placed in that juror's seat. For the next six to seven court days, the jurors were questioned, replaced, and new jurors questioned. At the end of the process, the jury panel consisted of seven African-Americans and five whites. There is no evidence in the approximately 1,000 pages of transcript covering jury selection that suggests any race-based questions, motives, or conduct. And no suggestion was made by either party during or after jury selection that the other was striking jurors based on race. At the end of jury selection, the court repeatedly asked counsel if the process was appropriate and whether there were any problems: "Before we impanel the jury I wanted to make certain after conferring with all lawyers that there was nothing that needed to be brought to my attention or if there was any problem that existed." Counsel for Allen stated, "We know of nothing, Your Honor, except I would say this . . .," and counsel then raised an objection about the prosecution's placement of evidence on the table. After that was addressed, the court again asked counsel, "Is there anything that needs to go on the record before the jury is impaneled for the defense?" Counsel for the defense responded, "No, Your Honor."

Allen made no objection during the entire week-long jury selection process that the State discriminated against African-Americans in exercising peremptory challenges, and he evidently saw no reason to undertake to make out a *prima facie* showing of discrimination that would have permitted the State "to come forward with a neutral explanation for challenging black jurors" and the court to remedy any problem. *Batson, 476 U.S. at 97.* Even though the *Batson* case had not yet been decided by the Supreme Court, it was

pending in that Court, and the State asserts that the parties were aware of that fact.

For the first time on direct appeal, however, Allen contended that the State's exercise of peremptory challenges against nine of eleven African-American jurors denied him equal protection. Noting an absence of any explanation in the record for the State's use of its peremptory challenges, Allen made a statistical argument to the North Carolina Supreme Court as follows:

> In this case, 65 prospective jurors were examined, including the examination of alternates: 37 whites, 24 blacks, 1 Indian, and three whose race is unknown. Of these, 14 were selected and 51 were excused: 22 by the Court for cause; 16 by the defendant peremptorily; and 13 by the prosecution peremptorily. Of the 13 jurors excused by the State, all but two were black. The final panel consisted of seven black and five white jurors, with two white alternates. During trial, the trial court removed the black juror in seat number 10 (Mrs. Johnson) and replaced her with the first alternate.

Allen asserted that these statistics and the voir dire of the jury created a *prima facie* case, but he pointed to no evidence from the voir dire to support this assertion.

The State argued to the North Carolina Supreme Court that Allen knew of the *Batson* argument during trial and did not make any objection. The State claimed that by raising the issue two years later for the first time on appeal, Allen was "sandbagging" the State, depriving it of the fresh recollections of its jury selection strategy that would have accompanied a contemporaneous objection by Allen:

> The defendant contends that he is entitled to raise this issue on appeal even though he failed to object at trial. If there ever was a case of "sandbagging," this is it. If you do not object to the peremptory excusing of jurors until two years later, then only the cold record is available for the use of the peremptory challenges. The District Attorney has no opportunity to explain why he did not like any of the jurors he excused. The District Attorney probably does not keep notes of why he excused particular jurors, so if a hearing was held, he would have no knowledge of a particular juror since he has tried hundreds of cases since that time.

Additionally, the State argued that the statistics did not make out a *prima facie* case. It pointed out that "of the 15 black veniremen tendered to the State, it accepted 7, or 47%"; that the jury as selected consisted of 58% African-Americans; and that at that time the population of Halifax County, from which the jury was drawn, was 48% African-American. The State also made an effort to reconstruct the reasons for its exercise of the peremptory challenges against African-Americans, noting that one important consideration given was whether any potential juror had a son because such a juror would empathize with Allen and his mother. The record of voir dire supports the State's assertion. The State further claimed that almost all of the African-Americans stricken "met the same pattern." Thus, with respect to juror Jacqueline Davis, who the dissenters have suggested was stricken because of race, the State pointed out to the North Carolina Supreme Court that Davis had a son. Tr. at 353.

Davis also knew one of the defense attorneys, who was a customer at the Davis store and to whom she referred as "Steve."

The North Carolina Supreme Court rejected the *Batson* challenge based on the facts that (1) "the State accepted seven of the seventeen black veniremen tendered" and (2) "the majority of the jury which tried the defendant was black." *State v. Allen, 323 N.C. 208, 372 S.E. 2d 855, 862 (N.C. 1988)*. The court concluded that in the circumstances where the State "accepted seven or forty-one percent" of the African-American members of the venire, an "inference" of racial motivation did not arise, and the defendant failed to make a *prima facie* case that the State's peremptory challenges were racially motivated. *Id.* Allen did not appeal this ruling to the United States Supreme Court in his petition for a writ of certiorari.

In his petition for a writ of habeas corpus filed in this case, Allen again raised the *Batson* issue, proffering only statistical evidence. After examining the record and the North Carolina Supreme Court's disposition of the *Batson* claim based on the record, the district court concluded:

> Examining this claim based upon the clearly established federal law existing in 1988, this court finds that the North Carolina Supreme Court's adjudication of this claim is neither contrary to nor an unreasonable application of *Batson*. *Batson* did not establish a mathematical formula to be applied but rather instructed that the trial courts were to consider "all relevant circumstances" surrounding the jury selection process. [Citation omitted]. Allen has failed to establish that the North Carolina Supreme Court's adjudication of this claim was contrary

to, or involved an unreasonable application of, *Batson*.

On this record, we affirm. First, we conclude that Allen did not adequately preserve his *Batson* objection. In July 1985, Allen filed a motion to increase the number of peremptory challenges available to him on five grounds, one of which was that the prosecutor had in the past assertedly exhibited a "propensity toward excluding blacks from trial juries by use of his peremptory challenges." Just prior to the beginning of jury selection on November 4, 1985, the trial court denied Allen's motion. After the jury selection process resulted in a jury that was 58% African-American, Allen did not renew his anticipatory *Batson* objection. Were these the only facts before us, Allen's case would be meaningfully indistinguishable from *Ford v. Georgia, 498 U.S. 411, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991)*, where the Supreme Court held that a pretrial motion relating to the State's use of peremptory challenges was sufficient to raise a *Batson* objection. In this case, however, the trial judge began jury selection by denying Allen's motion that was based, in part, on concern for the prosecutor's anticipated use of peremptory challenges and concluded jury selection by twice inviting Allen to voice any concerns with the *actual* jury selection process. The judge stated, "Before we impanel the jury I wanted to make certain after conferring with all lawyers that there was nothing that needed to be brought to my attention or if there was any problem that existed." After Allen's counsel voiced an objection to the courtroom placement of certain evidence, the judge again asked, "Is there anything that needs to go on the record before the jury is impaneled for the defense?" Allen's counsel responded, "No, Your Honor." Thus, even though Allen's July 1985 motion might otherwise have been sufficient to raise a *Batson* objection under the holding of *Ford*, Allen's silence after the trial

judge's repeated calls for objections after the actual jury selection amounted to an abandonment of his anticipatory *Batson* objection. It would be an odd result to allow a defendant who twice rejected a trial judge's explicit invitation to object contemporaneously to the jury selection process to exploit the faded memory of the prosecutors by raising such an objection years later.

In reaching this conclusion, it is important to clarify that Allen's *Batson* claim was not procedurally defaulted under any North Carolina or federal law. Rather, he is denied any remedy on this claim because he expressly relinquished his right to a remedy at trial by, in effect, consenting to be tried by the jury as constituted. He cannot rescind that consent now.

But even if Allen had preserved his objection, the burden of establishing a *prima facie* case under *Batson* falls on the defendant, *see Batson, 476 U.S. at 96-97*, and based on the record in this case, we conclude that Allen never carried that burden. We therefore agree with the district court's conclusion that the North Carolina Supreme Court's decision to reject Allen's *Batson* claim raised for the first time on appeal was not an "unreasonable application" of *Batson. See 28 U.S.C. § 2254(d)(1).*

Of course, the standard that Allen must now meet is not whether the North Carolina Supreme Court was right. That issue was available to him on direct review to the Supreme Court. The standard on collateral review of a State decision challenged through federal habeas corpus requires that the federal court deny the writ unless the State's adjudication of the particular issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1).* In

determining whether an application of Federal law is unreasonable, the Supreme Court in *Williams v. Taylor, 529 U.S. 362, 410-11, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*, stated:

> An *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under *§ 2254(d)(1)*'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

In *Batson*, the Supreme Court articulated the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *476 U.S. at 82*. To carry his burden, a defendant must show (1) that "he is a member of a cognizable racial group"; (2) that the "prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; and (3) that "these facts and any other relevant circumstances raise an inference that the prosecutor used [the peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Id. at 96*; *see also Keel v. French, 162 F.3d 263, 271 (4th Cir. 1998), cert. denied, 527 U.S. 1011, 144 L. Ed. 2d 249, 119 S. Ct. 2353 (1999)*. *Only after the defendant* makes a showing sufficient to raise an "inference of purposeful discrimination" is the State required "to come forward with a

neutral explanation for challenging black jurors." *Batson, 476 U.S. at 96-97.*

In this case, the *only* facts that Allen identified to support an inference of purposeful discrimination were raw statistics about the racial make-up of the venire and those excluded from the jury through peremptory challenges. He has presented no other circumstantial facts that "raise an inference" that the State was discriminating against African-Americans in exercising its peremptory challenges. Indeed, the State has pointed out that its voir dire of the venire was the same for African-Americans as it was for whites, and it points out that the circumstances revealed by answers to its voir dire as to each juror justified its exercise of peremptory challenges on racially neutral grounds.

Moreover, the only "pattern" that we can discern from the raw statistics that Allen has produced suggests that the State did *not* exercise its peremptory challenges on the basis of race. We know, for instance, that with respect to Seat 1, Seat 4, and Seat 8, on which the State exercised a majority of its peremptory challenges to African-Americans, the State ultimately accepted an African-American to sit on the jury in each of those seats. Indeed, with respect to Seat 10, after the State exercised a peremptory challenge against a white and after Allen exercised peremptory challenges against two whites, the State accepted the first African-American slotted for that seat. When the first person seated in Seat 7 was an African-American, the State accepted the juror. On Seat 2, after a white was challenged for cause, the State accepted the replacement African-American. On Seat 6, when the State exercised a peremptory challenge against a white, an African-American replaced the white and the State accepted the juror. In accepting these African-American jurors, the State left unused peremptory challenges that were available to it. Only on Seat 3 did the State's exercise of a peremptory

challenge result in the race of a juror changing from African-American to white. We conclude that this "pattern" supports an inference that discrimination against African-Americans was not a reason for the State's exercise of peremptory challenges. Concluding that the State was using peremptory challenges to fashion a jury with fewer African-Americans on it necessarily ascribes the highest degree of ineptitude to the State, for its efforts resulted in a jury being empaneled that had more African-Americans on it than if it had exercised no challenges at all. In the absence of any other circumstantial evidence, we cannot conclude that Allen carried his burden of making a *prima facie* showing. More relevant to the inquiry now, Allen has failed to establish that the North Carolina Supreme Court's application of *Batson* on this record was an unreasonable one. Therefore, we conclude that the district court correctly rejected Allen's *Batson* challenge.

The dissenting opinion faults the North Carolina Supreme Court for considering the statistical make-up of the impaneled jury in determining whether a *Batson* violation occurred and for failing to consider any of Allen's evidence of discrimination. *Post* at 61-62. It asserts that the North Carolina Supreme Court "should have focused on those members of the venire who were *excluded* from the jury." *Id.* at 62. It then reiterates Allen's statistical argument and concludes that "Allen's evidence of discrimination is compelling." *Id.* To support this conclusion, the dissenters recite Allen's evidence in its entirety:

> Out of 66 prospective jurors on the venire, 38 (57.5%) were Caucasian, 24 (36.3%) were African American, and 4 (6%) were of another race. (J.A. at 57.) The prosecution used 84.6% of its peremptory challenges to exclude African

> Americans from the jury, even though African Americans only represented 36.3% of the venire presented.

Id.

The use of these raw statistics, however, is both selective and uninformative. For example, the statistics as used do not account for the fact that the State exercised its peremptory challenges in a selective manner that reshaped the original panel seated, which had five African-Americans, into a jury of seven African-Americans. As already noted, most of the State's peremptory challenges were exercised on the selection of jurors to fill three seats, and the State ultimately accepted an African-American in each of those seats. We suggest that selective statistics just as well demonstrate the opposite inference. For example, the percentage of African-Americans accepted by the State and seated on the jury - 58% (7 of 12) - exceeded the percentage of African-Americans on the venire - 37% (24 of 65) - and exceeded the percentage of African-Americans in the county - 48%.

Though statistics are not utterly bereft of analytical value, they are, at best, manipulable and untrustworthy absent a holistic view of the circumstances to which they apply. The statistics relied upon by Allen, and upon which the dissenters command a "focus," do not tell the whole story or even an accurate story in this case. As we have already described in greater detail, the majority of the State's peremptory challenges against African-American venirepersons were exercised with respect to seats for which the State ultimately accepted an African-American juror. And there was only one seat on which the race changed from African-American to white as a result of the State's peremptory challenge. The end result was that from a venire consisting of 37% African-

Americans, the State accepted a jury of 58% African-Americans.

Perhaps out of concern that the statistical evidence proves nothing, the dissenting opinion engages in its own factfinding, comparing the circumstances of venireperson Jacqueline Davis, an African-American, with those of venireperson Mildred Thorne, who was white. Davis was peremptorily stricken by the State and Thorne was not. The dissent concludes that because both Davis and Thorne knew defense counsel and both seemed to respond similarly to questions about the death penalty, there was nothing to justify the State's treating them differently for purposes of exercising peremptory challenges. This comparison led the dissenters to conclude that the "decision to keep Juror Thorne is particularly suspect when compared to the prosecutor's decision to strike Juror Davis." *Post* at 62 n.3. The dissenting opinion then dresses up this "suspicion" into a factual "finding that the prosecution struck some jurors on the basis of race." *Id.*

As a preliminary matter, we note that the comparison of these two particular jurors was not urged by the litigants but was initiated by the dissenters on the cold record. In fact, the dissenting opinion's comparison derogates from Allen's strenuous argument in his reply brief that "this Court cannot evaluate" the State's reasons for dismissing jurors "on a cold record," and that any attempt to do so would be "speculation." Indeed, an examination of the comparison suggests that only speculation supports the dissenting opinion's conclusions. First, it must be recognized that the State's reasons for exercising peremptory challenges were never elicited on the record because no objection was ever made. The dissenting opinion never acknowledges the possibility of race-neutral factors on which the State could have legitimately relied. But even based on the record, it fails

to acknowledge the State's reconstruction of its reasons on its direct appeal to the North Carolina Supreme Court. In its explanation to that court, the State observed that juror Davis had a son, *see* Tr. at 353, making her a person who might be empathetic to Allen and his mother. The State pointed out that this mother-son relationship was an important consideration that formed its decisions to exercise peremptory challenges. Although Juror Thorne had a daughter, she did not have a son. Finally, the dissenting opinion does not consider the fact that even though the State exercised a peremptory challenge to strike Davis, it ultimately accepted an African-American as the juror in her seat.

The dissenting opinion's comparison of two jurors, totally out of context and without the data necessary to make an informed comparison, amounts only to speculation and implicitly confirms that, without the aid of such speculation, Allen has not otherwise presented evidence sufficient to raise an inference of race-based discrimination. Without any evidence of improper statements or questions, the statistical evidence considered more fully can hardly be found to evidence a pattern of the State exercising peremptory challenges to eliminate African-Americans from the jury.

In sum, while we need not resolve whether the North Carolina Supreme Court "got it right" in concluding that Allen failed to make a *prima facie* showing, there can be little doubt that its application of the *Batson* principles cannot be found to be an unreasonable one on this record. We therefore affirm the district court's dismissal of Allen's *Batson* claim.

WILKINS, Chief Judge, concurring:

I concur in Parts I through V of the opinion written by Judge Niemeyer and Judge Gregory. I also concur in Judge Gregory's plurality opinion stating that Allen is entitled to habeas relief based on the unconstitutional unanimity instruction given to the jury at his sentencing hearing. I write separately to add an additional comment regarding the prejudicial effect of this instruction.

As described in Judge Gregory's plurality opinion, the jury -- operating under the constraints of this improper instruction -- accepted three of the mitigating circumstances submitted to it (because all 12 jurors agreed) but rejected seven others (because at least one juror did not agree). One of the mitigating circumstances that the jury did not unanimously accept was the statutory "catch-all," which allows the jury to consider any "circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value," *id. at 101*; *see N.C. Gen. Stat. § 15A-2000(f)(9)* (2003). This catch-all mitigator permits jurors to consider, *inter alia*, whether the evidence supports imposition of a life sentence on grounds of mercy. *See State v. Hill, 331 N.C. 387, 417 S.E. 2d 765, 782-83 (N.C. 1992)* (noting that jurors in North Carolina are not precluded from giving effect to feelings of sympathy arising from the defendant's mitigating evidence).

The evidence here showed that Allen had a close relationship with some members of his family, including the eldest of his three sons. A reasonable juror could have concluded that Allen should be spared from the death penalty so that his children would not lose their father. Under the unconstitutional unanimity instruction given at Allen's sentencing hearing, however, that juror would have been precluded from voting for a life sentence based on these

sincere feelings of mercy. Indeed, even if *eleven* jurors had decided that mercy should be shown, they would not have been able to do so as long as the remaining member of the jury disagreed.

I recognize that the record includes evidence that might have offset any sympathy the jury felt for Allen and his family, including evidence that Allen's victim had a wife and two children of his own. On the other hand, given the broad discretion that jurors have when voting for a life or death sentence, at least one juror could have concluded that taking a father from Allen's children would only compound the great tragedy inflicted on Trooper Worley's children. *Cf. N.C. Gen. Stat. § 15A-2000(b)* (2003) (requiring the imposition of a life sentence when a capital sentencing jury is unable to reach a unanimous decision within a reasonable time).

It is not for us to decide which of these views is more sound, nor do I suggest that I would have concluded that a life sentence was appropriate. Our role is only to assess the likelihood that, in the absence of the unconstitutional instruction, at least one juror would have found as a mitigating factor that Allen deserved mercy and would have concluded that this factor, combined with others supported by the evidence, outweighed the aggravating circumstances established by the prosecution.* Based on my experiences as

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* The jury found two aggravating factors: that Allen committed murder "for the purpose of avoiding a lawful arrest," and that "this murder [was] committed against a law enforcement officer while engaged in the performance of his official duties." J.A. 99-100. Although the murder was unquestionably brutal, the jury was not asked to find any aggravating circumstance based on the nature of the killing. *Cf., e.g., N.C. Gen. Stat. § 15A-2000(e)(9)* (2003) (establishing as an aggravator that the crime of conviction was "especially heinous, atrocious, or cruel"). Thus, in assigning weight to the aggravating factors it had found, the jury was not permitted to consider the brutality of the murder for which Allen was convicted. We must

a trial judge and prosecuting attorney, I conclude that this possibility is sufficiently great that I remain in grave doubt about whether the error was harmless. *See O'Neal v. McAninch, 513 U.S. 432, 434, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995)*. I therefore vote to remand this case to the district court with instructions to issue a conditional writ of habeas corpus.

Judge Motz has requested that she be shown as joining in this opinion.

TRAXLER, Circuit Judge, concurring in part and concurring in the judgment:

I concur in Parts I through IV of the opinion authored by Judge Gregory and Part V of the opinion authored by Judge Niemeyer. I also concur in the judgment on the *McKoy* issue. Because I have come to view the *McKoy* issue somewhat differently from my colleagues, however, I write separately to express my views regarding how *McKoy, Chapman*, and *Brecht* intersect in the circumstances of this case.

I.

In the early morning hours of May 14, 1985, North Carolina Highway Patrolman Raymond Worley radioed his dispatcher that he was stopping two vans with Maryland license tags. After receiving no further communication, the dispatcher sent officers to search for Worley. Worley's patrol car was found on the side of the road, parked behind a white van. The driver's side window of the car was shattered and Worley was sitting in the driver's seat, his body leaning to the

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bear this restriction in mind in assessing the likelihood that, but for the unconstitutional unanimity instruction, at least one juror would have voted for a life sentence.

right with his head tilted downward. Blood covered his shirt and was spattered on his right arm, right leg and across the right side of his head. He was pronounced dead at the scene. A .22 caliber pistol and an identification card for Antonio Worrell were found at the scene. According to the autopsy, Worley had been shot three times with a .38 caliber firearm. One bullet entered behind his right ear, traveled through his neck, and lodged in his left back. Another bullet entered his right shoulder and lodged near the right base of his neck. A third bullet hit the middle finger of his left hand. The medical examiner testified that "Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood." *State v. Allen, 323 N.C. 208, 372 S.E. 2d 855, 858 (N.C. 1988).* It was estimated that Worley lost consciousness within a minute and died within three to four minutes of the shooting. Within a matter of hours, officers had located Allen's brother, Alex, walking near where a black van had been abandoned, in possession of a .38 caliber firearm, and tracked three other men, including Allen, to a nearby area where they were hiding in bushes.

Later that afternoon, Allen confessed to the murder. According to Allen, he, Alex, Worrell and Mack Greene left Washington, D.C. on May 11 in a stolen black van. They traveled to North Carolina, where they broke into a store and stole beer, cigarettes and the .22 and .38 caliber pistols. Allen kept the .38 pistol and gave the .22 pistol to Worrell. The men then stole a white van from a car lot. Allen and Alex got into the white van and followed Worrell and Greene in the black van, intending to return to Washington. While en route, Worley pulled over the two vans. After Worley approached and spoke to Worrell, the two men walked to the patrol car. Worley then motioned for Allen to come to the patrol car. According to Allen's written confession, Worley reached over to unlock the passenger door as Allen approached and

Allen began shooting. The men then fled the scene in the black van. At the murder trial, however, Allen denied shooting Worley. Allen testified that he, Worrell, and Worley had met at the patrol car, but that he had returned to the black van to get his license when he heard shots being fired.

After the jury convicted Allen of the first-degree murder charge and stolen property charges, a capital sentencing hearing was held pursuant to *N.C. Gen. Stat. § 15A-2000*. At the conclusion of the hearing, the trial court submitted two aggravating and ten mitigating circumstances for consideration by the jury. *See N.C. Gen. Stat. § 15A-2000(b)*. However, the jury was instructed that it must *unanimously* find the existence of any mitigating circumstances before such circumstances could be weighed against any aggravating circumstance. *See N.C. Gen. Stat. § 15A-2000(b)(2)*. The jury found the existence of both aggravators, but only three of the ten mitigators, and returned a sentence of death.

At the time Allen was sentenced, the North Carolina Supreme Court had upheld this requirement of unanimity for mitigating circumstances. *See State v. Kirkley, 308 N.C. 196, 302 S.E. 2d 144, 157 (N.C. 1983)*. During the pendency of his direct appeal, however, the United States Supreme Court overruled *Kirkley* and struck down the unanimity requirement because it "violated the principle in *Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)*, that a sentencer may not be precluded from giving effect to all mitigating evidence." *McKoy v. North Carolina, 494 U.S. 433, 438, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)* (quoting *Mills v. Maryland, 486 U.S. 367, 375, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)*). "Relevant mitigating evidence," the Court held, "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Id. at 440*

(internal quotation marks omitted). Two weeks after the Supreme Court's decision in *McKoy* was handed down, the Supreme Court granted Allen's petition for writ of certiorari and remanded his case to the North Carolina Supreme Court for further consideration in light of *McKoy*. *See Allen v. North Carolina, 494 U.S. 1021, 108 L. Ed. 2d 601, 110 S. Ct. 1463 (1990).*

On remand, the state conceded *McKoy* error in the charge in Allen's case, but argued that the error was "harmless beyond a reasonable doubt" based upon the post-sentencing jury poll, and the North Carolina Supreme Court agreed. *See State v. Allen, 331 N.C. 746, 417 S.E. 2d 227, 228 (1992).* The United States Supreme Court denied certiorari, with three justices voting to grant the petition for writ of certiorari and reverse the judgment. *See Allen v. North Carolina, 507 U.S. 967, 122 L. Ed. 2d 775, 113 S. Ct. 1402 (1993).* Allen's subsequent motion for appropriate relief, *see N.C. Gen. Stat. § 15A-1415*, was denied by the state court, and this *§ 2254* petition followed.

When *McKoy* was decided by the Supreme Court, the North Carolina court, faced with the task of dealing with a number of death sentences imposed under the erroneous instruction, was initially presented with the question of whether the error was susceptible to harmless error analysis. Although ultimately concluding that "*McKoy* errors are subject to harmless error analysis," the court recognized that "it would be a rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy, 327 N.C. 31, 394 S.E. 2d 426, 433 (N.C. 1990).* And since that time, the North Carolina Supreme Court has consistently decided that, where the evidence supports at least one unfound mitigating circumstance, the court cannot conclude beyond a reasonable doubt that the erroneous instruction did not prevent one or more jurors from finding the mitigating circumstance to

exist. *See State v. Zuniga, 336 N.C. 508, 444 S.E. 2d 443, 447 (N.C. 1994)* (noting that the North Carolina court "has refused to hold *McKoy* error harmless where [the Court has] found 'credible evidence supporting at least one submitted, but unfound mitigating circumstance'" (quoting *State v. Robinson, 330 N.C. 1, 409 S.E. 2d 288, 307 (N.C. 1991)))*. In addition, the court has *refused* to evaluate the harmlessness of a *McKoy* error by reweighing aggravating and mitigating evidence:

> This Court, in the *McKoy* error cases, has not inquired as to how individual jurors might have balanced the aggravating and mitigating evidence to resolve the harmlessness issue. On this issue, *our only inquiry has been whether the evidence is such that one or more jurors could reasonably have found a statutory mitigating circumstance to exist*. Where we have concluded there is such evidence, unless there is in the record something, such as a [post-verdict] poll, by which we can determine that the mitigating circumstance was unanimously rejected, we have consistently held *McKoy* error to be not harmless and the defendant entitled to a new capital sentencing proceeding. *We have not thought it our function, in resolving the harmlessness issue, to surmise how one or more jurors might weigh the aggravating and mitigating evidence, which is capsulized in the form of individually submitted "circumstances." This function, we continue to believe, is solely for the trial jurors who hear the evidence and are properly instructed on the law.*

State v. Lloyd, 329 N.C. 662, 407 S.E. 2d 218, 221-22 (N.C. 1991) ("*Lloyd II*") (internal citations omitted) (emphasis added).[1]

In the more than thirty capital cases to reach the North Carolina Supreme Court since *McKoy*, the court has found the unanimity instruction to have been a harmless error in a total of five cases (including *Allen)*. In two cases, the court found (as it did in *Allen*) that the specific questions asked of the individual jurors during the polling revealed that the jurors had unanimously rejected the unfound submitted circumstances. *See State v. Price, 331 N.C. 620, 418 S.E. 2d 169, 173 (N.C. 1992), vacated on other grounds by Price v. North Carolina, 506 U.S. 1043, 122 L. Ed. 2d 113, 113 S. Ct. 955 (1993)*; *State v. Laws, 328 N.C. 550, 402 S.E. 2d 573, 575-77 (N.C. 1991)*. In one case, the court found that the error was harmless because the jury actually *found* the existence of *all* proposed mitigating circumstances submitted, but nonetheless imposed the death penalty. *See State v. Roper, 328 N.C. 337, 402 S.E. 2d 600, 619 (N.C. 1991)*. And, in the single remaining case, the court found the error harmless because the defendant presented *no* mitigating evidence during the sentencing phase of his trial and the only mitigating circumstance submitted was the "catch-all" circumstance which, by definition, must arise "from the

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[1] In *Lloyd II*, the court, having rejected the state's contention that the jury poll revealed unanimous rejection of the unfound mitigating circumstances, concluded that the unanimity instruction was not otherwise harmless error because the evidence supported the trial court's submission of the "no significant history of prior criminal activity" mitigator to the jury. *See Lloyd II at 222* (internal quotation marks omitted); *see also State v. Lloyd, 321 N.C. 301, 364 S.E. 2d 316, 323-24 (N.C. 1988)* ("*Lloyd* I") (upholding trial court's submission of the "no significant history" mitigator despite the fact that defendant had been convicted of two prior felony and numerous misdemeanor convictions several years prior to the murder).

evidence" submitted. *See State v. Hunt, 330 N.C. 501, 411 S.E. 2d 806, 814 (N.C. 1992).*

II.

It is against the backdrop of this pertinent North Carolina law that I can now review the *McKoy* error under *28 U.S.C.A. § 2254(d)* (West 1994 & Supp. 2003) and under *Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).*

A.

The *McKoy* error is undisputed. Thus, the initial question before us is the same as that before the North Carolina Supreme Court: Was the *McKoy* error harmless beyond a reasonable doubt? *See Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).*[2] But, because that question was adjudicated on the merits by the state court, we may only review that adjudication under the deferential provisions of *§ 2254(d)*. We may grant federal habeas relief only if North Carolina's adjudication of the claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.; see also Williams v. Taylor, 529 U.S. 362, 376, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).*

The North Carolina court concluded that the *McKoy* error was "harmless beyond a reasonable doubt" based upon its determination that the post-verdict poll demonstrated that the

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[2] Although the state court did not cite to the *Chapman* harmlessness standard, *see Chapman, 386 U.S. at 24* (providing that error is harmless where it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"), the North Carolina standard applied under its statutes is the same as the *Chapman* standard.

individual jurors were unanimous in their rejection of the seven unfound mitigating factors submitted to it by the trial judge. *See Allen, 417 S.E. 2d at 228*. Like my colleagues, I find this construction of the jury poll to be an unreasonable application of the *Chapman* standard and, therefore, that *§ 2254* does not *preclude* us from granting habeas relief to Allen in this case.

B.

With no barrier to the grant of habeas relief presented by *§ 2254(d)*, I turn to the next distinct step in our analysis. A determination that the state court's adjudication was the product of an unreasonable application of *Chapman* only results in our conducting an independent review of the harmlessness of the *McKoy* error, as opposed to conducting further review under the deferential standards set forth in the AEDPA amendments to *§ 2254(d)*. And, because we are dealing with a constitutional error subject to harmless error review in a habeas proceeding, we are to review the claim not under the *Chapman* harmless-error standard, but under the harmless-error standard of review set forth by the Supreme Court in *Brecht*.

In recognition of the strong principles of comity and respect for state court judgments, *Brecht* directs that we not grant habeas relief to a defendant unless "'[the error] had a substantial and injurious effect or influence on the jury's verdict,'" *Brecht, 507 U.S. at 623* (quoting *Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*, or we are "in 'grave doubt' as to the harmlessness of [the] error." *Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)* (quoting *O'Neal v. McAninch, 513 U.S. 432, 438, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995)*); *see also Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998)*; *Cooper v. Taylor, 103 F.3d 366, 370 (4th Cir. 1996)* (en banc). We

"do[]not ask whether the evidence of guilt was sufficient, whether the jury would have reached the same conclusion if the error had not occurred, or whether the jury reached the correct result based on the evidence presented." *Boyd, 147 F.3d at 327.*

> In order for an error to have a substantial and injurious effect or influence, it must have affected the verdict. Because juries have a limited number of responses to give in a criminal trial -- guilty, innocent, or cannot decide -- an error is harmless when the error did not substantially sway or substantially influence the response.
>
> Thus, if the evidence is not merely sufficient, but so powerful, overwhelming, or cumulative that the error simply could not reasonably be said to have substantially swayed the jury's judgment, then the error is not harmful. On the other hand, if the federal court is in grave doubt about whether the trial error had a substantial and injurious effect or influence on the verdict and therefore finds itself in virtual equipoise about the issue, the error is not harmless.

Cooper, 103 F.3d at 370 (citations and internal quotation marks omitted). Also, the inquiry is no longer one of *who* bears the burden of establishing harmlessness or error. Rather, it is "conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens (*e.g.*, 'Do I believe the party has borne its burden of showing. . .?')." *O'Neal, 513 U.S. at 436-37.* "Grave doubt" exists when, in light of the entire record, "in the judge's mind, the matter is

so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id. at 435*. "Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error," "the petitioner must win." *Id. at 436, 437*.

Having reviewed the record in this case within the confines of this standard, I am compelled to join the vote to grant conditional habeas relief to Allen.

First, although I cannot say with certainty that the unanimity instruction had a substantial and injurious effect or influence on the verdict of death, the nature of the error in this case unquestionably leaves me in grave doubt as to whether it was in fact harmless. According to Allen's confession, Allen walked up to the driver's side window and shot Worley as he reached over to open the passenger door to his police car and Allen fled the scene with the others. Officer Worley likely lost consciousness within one minute and died within four minutes. During the sentencing phase of the trial, the state presented no additional facts in support of the two aggravating factors submitted, and we know that the jury *unanimously* found the existence of the only two aggravating circumstances submitted to it for consideration -- that Allen shot Patrolman Worley while Worley was engaged in his official duties in order to avoid being arrested for crimes that he committed with his cohorts during their trip from Washington to North Carolina.

Allen, however, presented the testimony of himself, his mother, his girlfriend, and his ex-wife in mitigation. With regard to Allen's background, Allen's mother testified that, from an early age, Allen witnessed frequent arguments between his parents, culminating in his need for medical treatment for nervousness. Allen's mother and father ultimately separated, following a violent argument that

occurred at Allen's third birthday party, and Allen was thereafter reared in a single-parent home by his mother and grandmother. From the time his parents separated until Allen was approximately 12 years old, Allen's father financially supported his ex-wife and children, but only saw his children once every three months or so. When Allen was approximately 12 years old and entering the sixth grade, his mother moved the family to Washington, D.C. As a result, Allen was able to see his father more frequently. However, Allen's most significant adolescent problems began at about this same time. Upon arriving in Washington, Allen failed the sixth grade. He started drinking alcohol at age 14 or 15, began using heroin at age 15 or 16, married his pregnant girlfriend and dropped out of high school in the 10th grade, and added Preludin (a form of speed) to his heroin use at about the same time. Allen's mother testified that Allen received a church education and had "plenty," but testified that Allen had successfully hidden his early use of alcohol and drugs from both his father and her.

The second category of mitigating evidence pertained to Allen's status as a father. Allen is the father of three sons. That is uncontroverted. As noted above, he married his first wife when he was 17 years old after she became pregnant with his first son, Timothy Jr. They divorced three years later, when Allen was 20 years old, but it appears uncontroverted that Allen maintained a very close and ongoing relationship with Timothy Jr. after the divorce. Allen, his mother and his father also maintained an ongoing relationship with Allen's first wife. Indeed, Allen's first wife and their son Timothy Jr. were present at the sentencing hearing and were pointed out to the jury, and she testified on Allen's behalf. There was also testimony that Allen maintains some contact with his third son, but that he has been unable to locate or have contact with his second son because the

mother moved away. There was also evidence that Allen maintained continuous employment while he was not incarcerated, which appears would have been at all times other than when Allen served a one-year sentence and a two-year sentence during his twenties.

As a result of the erroneous "unanimity" instruction given at the conclusion of the sentencing hearing, we know that the jury *unanimously* found three mitigating circumstances: (1) that Allen had no history of the use of a deadly weapon; (2) that Allen expressed remorse for the death of Trooper Worley; and (3) that Allen completed his high school education by obtaining his general equivalency degree while imprisoned. We also know that the jury *did not unanimously find* the existence of the seven additional mitigating circumstances that the trial court submitted for consideration: (1) that Allen had no significant history of prior criminal activity; (2) that Allen's age at the time of the offense (30 years old) was a mitigating factor; (3) that Allen was reared in a single-parent home; (4) that Allen is the father of three sons; (5) that Allen remained employed during the times he was not incarcerated; (6) that Allen was a supporting parent of at least one of his children; or (7) the "catch-all" question of whether any single other circumstance arising from the evidence existed that the jury thought had mitigating value. But, we do *not* know whether any juror or jurors (fewer than twelve) found that any of these seven potentially mitigating circumstances existed or, if they did, whether the juror or jurors would have weighed the additional mitigator or mitigators against the two aggravating circumstances and voted *against* the death penalty had they not been instructed that they *must ignore* them in the final analysis.

Having reviewed the entire record and, in particular the evidence supporting the mitigating circumstances which were not unanimously found by the jury, I cannot conclude

with "fair assurance," *O'Neal, 513 U.S. at 437*, that no "juror's sentencing decision would have been substantially influenced" by any of the mitigating factors not unanimously found by the jury, *see Boyd, 147 F.3d at 328*. And because, after reviewing the record and the evidence presented in mitigation and aggravation, I am in "virtual equipoise as to the harmlessness of the [*McKoy*] error," *O'Neal, 513 U.S. at 434*, I am directed by Supreme Court precedent to "treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.*

Second, I note that, while the *Brecht* analysis is not defined by opinions of the North Carolina Supreme Court, I believe habeas relief would be inappropriate under *Brecht* for an additional reason, more unique to this case. *Brecht* recognizes that "federal habeas courts play an important role in protecting the constitutional rights of state criminal defendants," but also reminds us that this "role is circumscribed and *secondary* to that of state courts." *Boyd, 147 F.3d at 327*.

In this case, the North Carolina Supreme Court found the *McKoy* error to be harmless (and thus one of the "rare cases" in which the defendant does not get a new sentencing hearing) because the jury poll revealed that the jury unanimously rejected the unfound mitigating circumstances, a decision which we have now rejected as being a unreasonable application of the *Chapman* harmless error standard. It seems perverse that we then consider denying habeas relief from a North Carolina death sentence imposed under North Carolina's death sentencing scheme because we believe, based upon *our* "reweighing" of the evidence under *Brecht*, that it should be upheld in the face of knowing that the North Carolina Supreme Court *did not* find the *McKoy* error harmless for that reason under the *Chapman* standard

and *would not* have performed such a reweighing itself. In short, we would be doing what North Carolina would not do. *Cf. Maynard v. Cartwright, 486 U.S. 356, 365, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988)* (upholding invalidation of death sentence imposed by Oklahoma jury where one of two aggravating circumstances submitted to the jury was unconstitutional and Oklahoma courts had "'no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance'" (quoting *Cartwright v. Maynard, 822 F.2d 1477, 1482 (10th Cir. 1987))).*[3] Without a post-verdict poll that would legitimately cure the *McKoy* error, I believe North Carolina's law is unequivocal that Allen would have received a resentencing hearing. And, this belief is only bolstered by the fact that the state of North Carolina did not argue as an alternative ground for denying habeas relief that the verdict should be upheld based on a reweighing of the evidence.

In conclusion, although I might have found none of the additional mitigating factors and voted to render the same verdict as did the improperly instructed jury, I would respect North Carolina's view that it is not the court's "function, in resolving the harmlessness issue, to surmise how one or more jurors might weigh the aggravating and mitigating evidence. . . . This function . . . is solely for the trial jurors

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[3] More specifically, in *Cartwright v. Maynard, 822 F.2d 1477, 1482 (10th Cir. 1987)*, the Tenth Circuit noted that "the Oklahoma courts had refused to apply the harmless error analysis or to independently reweigh the aggravating and mitigating circumstances. Thus, Oklahoma had no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." On appeal, the Supreme Court noted that "[if] this was the case at that time, and the State does not dispute it, the Court of Appeals cannot be faulted for not itself undertaking what the state courts themselves refused to do." *Maynard v. Cartwright, 486 U.S. 356, 365, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988).*

who hear the evidence and are properly instructed on the law." *Lloyd, 407 S.E. 2d at 222.* And even though we would not be bound by North Carolina's interpretation of how *Chapman's* "harmless beyond a reasonable doubt" standard is to apply to a constitutional error reviewed under *Brecht*, the same principles of comity and respect for the state courts which underscore *Brecht* would render it improper for us to uphold North Carolina's death sentence on this basis. In any event, the evidence submitted in support of the unfound mitigating factors is not insignificant nor incredible in my view, nor apparently in the view of the North Carolina trial court which admitted the evidence *and* submitted the mitigators (some over objection by the state) as being supported by the evidence. For all these reasons, I am in grave doubt as to the harmlessness of the trial error (and in no doubt as to the prejudice Allen would have suffered if this court had denied habeas relief following a reweighing process).

III.

For the foregoing reasons, I agree that the state court's adjudication of Allen's *McKoy* claim was unreasonable and that Allen is entitled to a conditional writ of habeas corpus because I am in grave doubt as to whether the *McKoy* error was harmless under the *Brecht/O'Neal* standard. Under such circumstances, I am compelled to join in the decision to grant Allen a conditional writ of habeas corpus and leave it for a properly instructed jury to determine on an individual basis whether the mitigating circumstances of Allen's life outweigh the aggravating circumstances of this unquestionably senseless murder.

Judge Shedd has requested that he be shown as joining in this opinion.

GREGORY, Circuit Judge, concurring in the judgment on the *McKoy* issue:

During the sentencing phase of Allen's trial, the judge instructed the jury that it must unanimously find the existence of any mitigating circumstance before considering that circumstance in determining whether Allen should be sentenced to life imprisonment or death. This was the same instruction that the Supreme Court found unconstitutional in *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*. In *McKoy*, the Court held this jury instruction unconstitutional because the "unanimity requirement . . . prevents the sentencer from considering all mitigating evidence." *494 U.S. at 435*. Thus, on direct review in this case, the Supreme Court vacated Allen's sentence and remanded the case to the North Carolina Supreme Court in light of *McKoy. Allen v. North Carolina, 494 U.S. 1021, 1021, 108 L. Ed. 2d 601, 110 S. Ct. 1463 (1990)*.

On remand, the North Carolina Supreme Court held that the unanimity instruction was indeed unconstitutional under *McKoy. State v. Allen, 331 N.C. 746, 417 S.E. 2d 227, 228 (N.C. 1992)*. The court nonetheless affirmed Allen's death sentence finding the error "harmless beyond a reasonable doubt" based solely on the jurors' responses to a postverdict poll. *Id. at 228*.

Allen then filed this motion for habeas relief, challenging the North Carolina Supreme Court's finding that the concededly unconstitutional instruction constituted harmless error. The district court, although eventually rejecting Allen's claim, granted a certificate of appealability with respect to this issue. Thus, the district court recognized that Allen had made a substantial showing of the denial of a constitutional right. *See Slack, 529 U.S. at 483*. Because Allen has made

this showing, we, the plurality, proceed directly to the merits of his claim.

As noted above, we may grant Allen habeas relief only if his claim meets the criteria for relief as detailed in *§ 2254(d)(1) of the AEDPA*. Pursuant to that statute, the state court decision must either be contrary to, or involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See Williams, 529 U.S. at 411*. As the Court has recently reiterated, " *§ 2254(d)(1)*'s 'contrary to' and 'unreasonable application' clauses have independent meaning," and provide independent bases for habeas relief. *See Bell v. Cone, 535 U.S. 685, 694, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002)*. A federal habeas court may grant relief under the "contrary to" clause if "the state court applies a rule different from the governing law set forth in [Supreme Court precedent], or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Id.* Alternatively, a writ can issue under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [Supreme Court precedent] but unreasonably applies it to the facts of the particular case." *Id.* A writ cannot issue merely because a "state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Williams, 529 U.S. at 411*.

In this case, Allen is not entitled to relief on his jury instruction claim under the "contrary to" clause. The state court properly identified the governing law -- both the holding in *McKoy* that North Carolina law imposing a unanimity requirement on mitigating circumstances is

unconstitutional, and the proper harmless error standard.[1] Moreover, Allen does not contend the state court unreasonably applied the governing law with respect to *McKoy* itself. After all, the state court held that the unanimity instruction employed in Allen's sentencing proceeding was unconstitutional. Allen does contend, however, that he is entitled to relief under the "unreasonable application" clause because the state court unreasonably applied the harmless error standard, as articulated in *Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)*, to the facts of his case.

The North Carolina Supreme Court found the *McKoy* error to be "harmless beyond a reasonable doubt" based solely on the results of a post-verdict poll of the jury. *Allen, 417 S.E. 2d at 228*. The court recounted:

> The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still

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[1] The Supreme Court has directed that when considering a case on direct appeal, a court can find a constitutional error harmless only if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999)* (quoting *Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967))*; *see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986)* (holding that "an otherwise valid conviction [or sentence] should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless *beyond a reasonable doubt*" (emphasis added)).

> assented thereto. Each juror answered in the affirmative.
>
> *It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find.*

Id. (emphasis added). Thus, on the basis of each juror's responses to a routine post-verdict jury poll, *N.C. Gen. Stat. § 15A-1238* (providing that after return of a criminal verdict, upon motion of either party or judge's own motion, each juror be polled as to whether the verdict announced is his or her verdict), the court reasoned that giving the unconstitutional jury instruction constituted harmless error beyond a reasonable doubt. *Allen, 417 S.E. 2d at 228.* The North Carolina Supreme Court concluded that resentencing was not necessary because this poll established that no individual juror voted for any of the seven mitigating circumstances that the collective jury had not unanimously found.

In doing so, the North Carolina Supreme Court placed inordinate reliance on a poll that was never designed to, nor did it, cure the *McKoy* error. Rather, as is evident from even a cursory review of its substance, the poll merely confirmed that each juror followed the trial court's unconstitutional instruction in sentencing Allen to death.

When the clerk polled each juror, she read the entire verdict form, which not only specifically asked, "Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?"; but also stated, "In the space after each mitigating circumstance, write 'yes,' if you *unanimously* find that mitigating circumstance by a preponderance of the evidence. Write, 'No,' if you do not *unanimously* find that mitigating

evidence." (J.A. 137) (emphasis added). After reading through all of the proffered mitigating circumstances, the clerk queried the jurors if there were "any other circumstance or circumstances arising from the evidence which you, *the jury*, deem to have mitigating value." (J.A. 106) (emphasis added). That is, in the verdict form, the term "you" was defined in the collective, referring to "you, the jury." Importantly, no juror was ever asked how he or she individually voted on any of the mitigating circumstances. Instead, after reading the verdict form along with the jury's collective responses, the clerk asked each juror, "Are these the answers to your issues?," "Are these still the answers to the issues?," and "Do you still assent thereto?" (J.A. 107).

The clerk's questions imply that jurors were not being asked for their individual votes on the mitigating circumstances, but rather, that they were being asked if they still assented to the jury's collective decisions. This is a vital distinction. A juror might recognize that he would have found the existence of a mitigating circumstance had he been permitted to consider the question on his own. However, he would also recognize that the jury did not unanimously find the existence of that circumstance, and so he would be compelled to "still assent" to the jury's collective decision not to consider that circumstance, regardless of how he individually voted on the matter.

As the Supreme Court has explained, the unanimity requirement is unconstitutional because it "allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." *McKoy, 494 U.S. at 439* (internal quotation marks omitted). "Moreover, even if all 12 jurors agree that there are *some* mitigating circumstances, . . . [a unanimity requirement] prevents them from giving effect to evidence supporting any of those circumstances in their deliberations .

. . unless they unanimously find the existence of the *same* circumstance." *Id.* The damage done by imposing a unanimity requirement is that it prevents a juror who found the existence of a mitigating circumstance from fully participating in the jury's deliberations as to death. The requirement bars him or her from bringing his or her appreciation of that mitigating circumstance to bear on the jury's collective sentencing decision.

It is at this critical stage -- where we must attempt to understand the effects of the unanimity requirement on the jury's internal deliberations -- that the post-verdict poll fails to provide any meaningful insight. The poll did not, and could not, shed light on the critical issue of whether any individual juror voted for a given mitigating factor. In short, the post-verdict poll reveals nothing about the individual votes by the jurors on the seven mitigating circumstances that the jury did not unanimously find. As Justice Blackmun observed, such a poll "tells us nothing about how the juror would have voted -- either on a particular mitigating circumstance or on the ultimate life-or-death question -- had he been instructed that he could give effect to all the mitigating evidence, as the Constitution requires." *Price v. North Carolina, 512 U.S. 1249, 1251, 129 L. Ed. 2d 888, 114 S. Ct. 2777 (1994)* (Blackmun, J., concurring in the grant of certiorari).

Therefore, we find that in determining that this post-verdict poll rendered the *McKoy* error harmless, the North Carolina Supreme Court's application of *Chapman's* governing legal principles was objectively unreasonable, resulting "in a decision that . . . involved an unreasonable application of clearly established Federal law." *28 U.S.C. §*

2254(d)(1).[2] Accordingly, "the requirements of *§ 2254(d)* . . . pose no bar to granting petitioner habeas relief." *Wiggins, 123 S. Ct. at 2539*.[3]

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[2] The North Carolina Supreme Court itself has recognized that, "it would be a rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy ("McKoy II"), 327 N.C. 31, 394 S.E. 2d 426, 433 (N.C. 1990)*; *see also State v. Fullwood, 329 N.C. 233, 404 S.E. 2d 842, 844 (N.C. 1991)* ("In light of the evidence adduced at trial, we cannot conclude . . . beyond a reasonable doubt that had . . . jurors been permitted, under proper instructions, to consider [the mitigating] circumstance, they nevertheless would have voted for the death penalty rather than life imprisonment."). The state court further opined, in dicta, as follows:

> A case in which there was little or no mitigating evidence proffered, or in which the jury found the existence of all proposed mitigating circumstances but nonetheless imposed the death penalty, could be a candidate for successful argument that a *McKoy* error was harmless, but we save decision on this point until such a case arises.

McKoy II, 394 S.E. 2d at 433 n.4. The prosecution's case before this court, of course, is not nearly as strong as these two hypotheticals suggest it should be in order to support a finding of harmlessness. And, given that North Carolina courts have not given a unanimity instruction for over a decade, such a "rare case" is not likely to arise anytime in the future; indeed, *McKoy* errors in general should be a remnant of the past.

[3] Having found that the *analysis* employed by the state court was unreasonable, we could not properly deny relief under *§ 2254(d)* on the basis that the *result* of the state court proceeding was not unreasonable. Such a conclusion would necessarily be premised on reasoning that was *not* relied on by the state court. Reasoning that the state court could have -- but did not -- employ must be evaluated de novo, without applying the deferential standard prescribed by *§ 2254(d)(1)*. *See Wiggins, 123 S. Ct. at 2540*. The *Wiggins* Court explained that *§ 2254* deference to a state court finding is simply not possible in these circumstances because "the State court made no such finding." *Id.*

Although the jury poll was the sole basis for the state court's (unreasonable) determination that the *McKoy* error was harmless, and it was also the *only* argument raised by the government on appeal to support this (unreasonable) determination, we may affirm on any ground supported by the record, even if it has not been raised by the parties. *See In re A.H. Robins Co., 880 F.2d 709, 748 (4th Cir. 1989), abrogated on other grounds by Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).* It is therefore appropriate for us to engage in the additional analysis mandated by *Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).*

Under *Brecht, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710*, a habeas petitioner is still not entitled to relief, despite having satisfied AEDPA criteria, unless the state court's unreasonable application of federal law had a "substantial and injurious effect or influence in determining the jury's verdict." *Id. at 637.*[4] The *Brecht* standard, adopted

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[4] We note that some of our sister circuits have questioned whether *Brecht* remains applicable for habeas petitions filed after the effective date of AEDPA. *See Anderson v. Cowan, 227 F.3d 893, 898 n.3 (7th Cir. 1999)* (observing that the Sixth Circuit in *Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999)*, applied *Brecht* in a post-AEDPA setting, but that the Eighth Circuit, in *Whitmore v. Kemna, 213 F.3d 431 (8th Cir. 2000)*, "indicated skepticism about the continued vitality of *Brecht.")*. However, both this court and the Supreme Court have applied *Brecht* in post-AEDPA cases. *See Early v. Packer, 537 U.S. 3, 10-11, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002)* (per curiam); *Penry v. Johnson, 532 U.S. 782, 795, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001)*; *Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)*. The Sixth Circuit has aptly summarized the propriety of *Brecht's* continued viability, stating that the *Brecht* standard "quite precisely captures Congress's intent as expressed in AEDPA and, therefore, continues to be applicable." *Nevers v. Killinger, 169 F.3d 352, 371 (6th Cir. 1999), abrogated on other grounds by, Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000).*

from and first explicated in *Kotteakos v. United States, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*, requires a greater showing of prejudice than *Chapman, Brecht, 507 U.S. at 637*, but a lesser showing than the "reasonable probability" standard. *Kyles v. Whitley, 514 U.S. 419, 435-36, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. Under the *Brecht* standard, the inquiry cannot be merely whether sufficient evidence "supports the result," or whether the jurors were "right in their judgment, regardless of the error or its effect upon the verdict," *Kotteakos, 328 U.S. at 764-65*; rather the proper inquiry must focus on whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht, 507 U.S. at 631-39*. If a court "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos, 328 U.S. at 765*.

Neither *Brecht* nor *Kotteakos* was a capital case, and thus they only addressed the question of the defendant's guilt or innocence, not the question of whether the defendant should be executed. Accordingly, we recognize that the *Brecht-Kotteakos* standard must be somewhat modified when applied in circumstances like those at issue here -- the sentencing phase of a capital case. In this context, that standard requires a reviewing court to determine whether it can say "with fair assurance" that an error did not "substantially sway[]" the response of the jury to the question put before it, *i.e.*, should the defendant receive the death penalty. *Kotteakos, 328 U.S. at 765*. Moreover, in this context a reviewing court must undertake the *Brecht* analysis mindful of the Supreme Court's recognition that an appellate court faces certain difficulties when "determining sentencing questions in the first instance." *See Clemons v. Mississippi,*

494 U.S. 738, 754, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990); accord Caldwell v. Mississippi, 472 U.S. 320, 330, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985).

With these principles in mind, we turn to the application of the standard **[**76]** required by *Brecht* and *Kotteakos* to the facts at hand. We note at the outset that the jury poll at issue in this case was so woefully inadequate, for all the reasons outlined above, that it alone clearly did not render the *McKoy* error harmless even under the *Brecht* standard. We next examine whether, based on a more robust review of the record evidence beyond the jury poll, the *McKoy* error had a "substantial and injurious effect or influence" on the jury's sentencing recommendation in Allen's case. In particular, we ask whether we can conclude, with "fair assurance," that had the jurors been permitted to independently assess the additional mitigating evidence presented at Allen's sentencing proceeding, and weigh that evidence, along with the mitigating factors unanimously found, against the aggravating circumstances, they would nevertheless have voted for the death penalty. We cannot.

In this case, the trial judge found sufficient evidence to submit two aggravating factors and ten mitigating factors to the jury.[5] The jurors unanimously found the existence of two aggravating factors: (1) murder committed for the purpose of avoiding a lawful arrest and (2) murder of a law enforcement officer while engaged in the performance of his official

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[5] North Carolina law requires a trial judge to make an initial finding that the evidence presented at trial supported the propriety of submitting each aggravating or mitigating factor to the jury. *N.C. Gen. Stat. § 15A-2000(b)* ("In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances . . . which may be supported by the evidence . . . .").

duties. They also unanimously found three mitigating factors to be present: (1) Allen had no history of crimes involving deadly weapons, (2) he expressed remorse for the victim's death, and (3) he earned a GED. However, because of the unconstitutional *McKoy* instruction, each juror was deprived of the ability to individually weigh the other seven mitigating factors.

North Carolina statutory law requires jurors to determine: (1) whether any sufficient aggravating circumstances exist; (2) whether any sufficient mitigators exist; and (3) after weighing these considerations, whether the defendant should be sentenced to life imprisonment or death. *N.C. Gen. Stat. § 15A-2000(b)*; *see also State v. Hunt, 357 N.C. 257, 582 S.E. 2d 593, 598 (N.C. 2003)*; *State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510, 542 (N.C. 1979)*. This sentencing scheme expressly prohibits the jury from considering *any* aggravating factors not listed in the statute (which does not contain a nonstatutory category or a catch-all provision), and limits the jurors' deliberations to weighing the relevant aggravating and mitigating factors. *See N.C. Gen. Stat. § 15A-2000(b), (e)*; *see also Hunt, 582 S.E. 2d at 598*; *Barfield, 259 S.E. 2d at 542*. Our duty under *Brecht* is to determine what effect the admitted error had on the *jury's decision-making process*. In doing so, we recognize that the jury's process was carefully circumscribed by statutory dictates, limiting deliberation to *two* aggravating factors -- that the murder was committed for the purpose of avoiding a lawful arrest and that the murder was of a law enforcement officer while engaged in the performance of his official duties -- thus there is no legal basis to weigh the overall circumstances of the crime outside these two factors.

So we proceed, as we must, under the North Carolina statutory scheme, and in doing so further recognize that a

North Carolina court may not impose death if a single juror votes in favor of life imprisonment. Indeed, "if the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment . . . ." *N.C. Gen. Stat. § 15A-2000(b).* Accordingly, we must now assess whether we can say "with fair assurance," *Kotteakos, 328 U.S. at 765*, that not a single resolute juror would have voted for a life sentence.

In addition to the mitigating factors unanimously found by the jury (that Allen earned a GED degree, had no history of crimes involving deadly weapons, and expressed remorse for the victim's death) the defense offered evidence of seven other mitigating factors: (1) Allen's age, (2) his lack of significant criminal history, (3) his rearing in a single-parent home, (4) his parenting of three children, (5) his history of gainful employment, (6) his status as a supporting parent to a child, and (7) a catch-all category for other circumstances that the jury deemed to have mitigating value.

During Allen's sentencing proceeding, substantial evidence was presented to support several of these additional mitigating factors. However, we do not believe that any reasonable juror could have concluded that Allen presented sufficient evidence that his age -- thirty at the time of the murder -- should count as a sufficient mitigating factor. After all, a person of thirty cannot reasonably be characterized as too young to appreciate the seriousness of his crime. Further, although Allen's criminal history -- convictions for shoplifting, breaking and entering, and burglary -- does not involve convictions for violent offenses, and so in that respect is arguably "not significant" and thus could be considered mitigating, we do not believe any reasonable juror could conclude that this evidence added enough to the mitigating factors unanimously found (given that the jury had already found Allen's lack of history of crimes involving

deadly weapons to be a mitigating factor) to outweigh the aggravating circumstances. Thus, if the *only* additional mitigating evidence Allen offered pertained to his age and prior criminal history, we believe the *McKoy* error here would be harmless.

But of course that is not the situation here. Allen offered evidence that from the time he was a young boy he was raised in a singleparent home, and although he had more frequent contact with his father later in life, he only saw his father three or four times a year until he entered sixth grade. Further, Allen remained employed when he was not incarcerated, a fact that the dissent does not contest. And, in addition to the indisputable fact that Allen fathered three children, there was abundant evidence that he maintained an ongoing, supportive relationship with his eldest child, Timothy Jr. Indeed, Timothy Jr. was present at his father's sentencing hearing, at which his mother, Allen's long divorced ex-wife, unequivocally testified that Allen had a "very good" relationship with their son.

Furthermore, the jury heard a good deal of additional testimony that could qualify as another "circumstance . . . deemed to have mitigating value." *N.C. Gen. Stat. § 15A-2000(f)(9)*. For example, Allen presented substantial evidence that his parents engaged in physical fights in his presence, which petrified him. In fact, their ultimate separation and divorce resulted from one such fight that occurred during Allen's third birthday party in which the police were called.[6] Similarly, the jury heard evidence that

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[6] There is a minor factual discrepancy in the record concerning the timing of this incident. Allen testified that this fight occurred at his fifth birthday party. *See* Tr. at 3047, 3052-53. His mother, however, testified the fight and attendant separation occurred when her son was three. *See id.* at 3125-26.

Allen was a shy, timid person, bullied by others, who did not use firearms, and was unwilling or unable to fight back. And although Allen was never physically abused as a child, from an early age he lost himself in alcohol and drugs.

Given this evidence, we cannot say "with fair assurance" that no reasonable juror could have found these circumstances to have mitigating value. Nor can we conclude that precluding the jurors from individually weighing these last five mitigating factors *plus* the three unanimously found mitigators against the two aggravating circumstances did not "substantially sway[]" their decision to recommend that Allen be executed. *Kotteakos, 328 U.S. at 765*. Rather, there is a sufficient likelihood that at least one juror, after hearing this evidence and properly weighing all eight colorable mitigating factors against the two aggravating factors, would have been persuaded to spare Allen's life. This is not to suggest that Allen did not commit a horrible crime, nor that jurors would not properly consider the aggravating circumstances -- murder of a law enforcement officer performing his duties for the purpose of avoiding arrest -- to be exacerbating. Nevertheless, we cannot say with any "fair assurance" that a reasonable juror would not have concluded, after properly weighing the aggravating factors against all eight mitigating factors, that Allen's life should be spared because, despite the terrible crime he committed, Allen exhibited some redeeming qualities -- including efforts to overcome a less than ideal childhood and lead a productive life by obtaining a GED, finding employment, and providing ongoing emotional support for a son. There is a sufficient likelihood that these efforts, particularly given Allen's remorse for Trooper Worley's death, the loyalty Allen inspired in his ex-wife and son, demonstrated by his ex-wife's supportive testimony on his behalf and the presence of his son at the sentencing hearing, and the uncontradicted

testimony that Allen had never before used a firearm to commit a crime, could well have swayed at least one of the twelve jurors to determine that Allen should be imprisoned for the rest of his life, rather than executed.

As the Supreme Court recognized in *Mills v. Maryland, 486 U.S. 367, 374, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)*, even if all twelve jurors agreed that some of the nonunanimous mitigating circumstances were present, and further agreed that those mitigating circumstances (combined with the unanimously found mitigators) outweighed the aggravating factors, if the jurors disagreed as to the particular mitigating circumstances because of the unconstitutional instruction, they would never be permitted to "engage in the [proper] weighing process or any deliberation on the appropriateness of the death penalty." *Id.* Indeed, even if eleven jurors agreed that five non-unanimous mitigating factors were present, under the unconstitutional jury instruction they could have found *no* additional mitigating circumstances. *Id.* Thus, instead of those eleven jurors weighing eight mitigating circumstances against the two aggravating factors, they were only permitted to weigh the three mitigating circumstances on which they were unanimous. Recognizing that all aggravating and mitigating factors do not warrant the same weight, and that jury deliberations are an inexact science at best, this means that a possible fifty-five additional votes (eleven jurors times five factors) could have been cast in favor of mitigation. Any one of these fifty-five possible votes could, in turn, have formed the basis for a decision against the imposition of the death penalty. When the substantial evidence presented is evaluated in light of the broad discretion conferred on jurors in capital sentencing proceedings, we find ourselves unable to say, as we must to uphold a sentence of death, that *none* of the jurors would have been persuaded to vote for life

imprisonment instead.[7] After all, it only takes one hold-out juror to prevent the imposition of the death penalty, and in this case, we cannot say with "fair assurance" that no juror would have been swayed by the mitigating factors that the jurors were unlawfully precluded from individually considering, including the highly discretionary catch-all factor, particularly when combined with the unanimously found mitigating factors.

Judges Luttig and Williams, of course, reach a contrary conclusion. In the view of Judge Williams, the effect of the mitigating factors unlawfully kept from individual consideration by the jurors is so minimal that she can conclude, with "fair assurance," that the judgment was not substantially swayed by the error. *Post* at 56. We respectfully disagree with Judge Williams' conclusion. Her approach does not appear to adequately acknowledge the possible cumulative impact of the additional mitigating factors. Even if a juror might not have found that each of those additional factors independently outweighed the aggravators, a

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[7] Indeed, a juror, when given the appropriate latitude to consider such mitigating evidence, may decline to impose the death penalty even for crimes that are "especially heinous, atrocious, or cruel." *See State v. Stokes, 319 N.C. 1, 352 S.E. 2d 653, 665 n.14 (N.C. 1987)* (citing twenty cases involving twenty-four defendants in which the jury "recommended life imprisonment despite finding the [statutory aggravating factor rendering the] murder . . . especially heinous"); *see also State v. Meekins, 326 N.C. 689, 392 S.E. 2d 346, 347-48* & n.1 (N.C. 1990)(defendant was sentenced to life for first-degree murder despite finding of "heinous, atrocious, or cruel" aggravating factor based on repeatedly stabbing to death a seventy-nine year old woman); *State v. Wilds, 133 N.C. App. 195, 515 S.E. 2d 466, 472 (N.C. App. 1999)* (defendant was sentenced to life on first-degree murder conviction despite finding of "heinous, atrocious, or cruel" aggravating factor based on the fact that defendant repeatedly stabbed his wife to death in front of their children).

reasonable juror well could have concluded to the contrary when considering those factors *collectively, and in addition* to the three unanimously found mitigators. A reasonable juror could have determined, when the *additional* evidence as to Allen's difficult childhood, his ongoing emotional support of his son, and his employment are considered along with Allen's genuine remorse for the murder, his achievement while incarcerated, and his lack of history of crime involving deadly weapons, that those mitigating factors outweighed the two aggravating circumstances. *Cf. Caldwell, 472 U.S. at 330* ("Whatever intangibles a jury might consider in its sentencing deliberation, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.'") (citation omitted).

A reviewing court's proper role in determining an error's harmlessness entails an individualized inquiry of the sort in which we have engaged here. The inquiry before us is "not [whether these laymen] were right in their judgment, regardless of the error or its effect upon the verdict" but "rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos, 328 U.S. at 764*. Long ago the Supreme Court cautioned that in assessing whether an error is harmless, an appellate judge is to determine jurors' "reactions *not by [the judge's] own*, but with allowance for how others might react and not be regarded generally as acting without reason." *Kotteakos, 328 U.S. at 764* (emphasis added). Thus, the Court directed: "The crucial thing is the impact of the thing done wrong, on the minds of other men, not on one's own, in the total setting." *Id.*

Our assessment of the harmlessness of an error is particularly significant in this case because of the character of the proceedings at issue -- a sentencing hearing held to determine whether a man lives or dies. In reviewing for harmless error, the Supreme Court has told us that a court is to consider "the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole." *Kotteakos, 328 U.S. at 762.* This does not mean that we apply a different harmless error standard in capital cases, but we must apply the standard with the utmost care, *see Caldwell, 472 U.S. at 329* ("Under the *Eighth Amendment* the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.") (internal quotation marks and citation omitted), and with due acknowledgment of the fact that the jury retains great discretion in determining whether to impose the death penalty on a capital defendant, *see Tuilaepa v. California, 512 U.S. 967, 979-80, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994)* (stating that "the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty") (internal quotation marks and citations omitted). That the error here denied jurors the right to consider a number of mitigating factors in reaching that important, and largely discretionary, decision is particularly problematic because it deprives us of any "fair assurance" that all jurors would have nonetheless voted for death.

Having conscientiously applied the Supreme Court's directives, we cannot say with fair assurance that the *totality* of the mitigation evidence weighed against the two aggravating factors would not have swayed at least one juror to spare Allen's life. Thus, we hold that the *McKoy* error had

a "substantial and injurious effect or influence in determining the jury's verdict" warranting habeas relief under *Brecht*. At a minimum, the likelihood that a properly-instructed jury would not have voted to unanimously impose the death penalty is sufficiently great to raise "grave doubt" as to whether the *McKoy* error was harmless. *See O'Neal v. McAninch, 513 U.S. 432, 435, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995)* (holding that when "grave doubt" exists in a habeas case, "we conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')"). Because the *Brecht* standard does not require even a reasonable probability that the error in question affected the outcome of the proceeding, *see Kyles, 514 U.S. at 436*, we find a "substantial and injurious effect" as well. Therefore, we join the judgment on the *McKoy* issue and hold that Allen is entitled to habeas relief under *Brecht*.[8]

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[8] Lastly, we respond to Judge Luttig's assertion that "the court has been in violation of the statutory time limitations governing this case for over eight months already," *post* at 55, and that "the *en banc* court was obligated to have decided the case no later than July 22, 2003." *Post* at 54. First, Judge Luttig rightfully concedes that we are not, in fact, bound by AEDPA itself, but are bound by Judicial Council Order No. 113 which adopts *§ 2266*'s time limitations. *Section 2266 of AEDPA* applies *only* to "opt-in" states. *Section 2261* of title 28 provides that a state must meet specific, "opt-in" requirements to obtain expedited habeas review. *28 U.S.C. § 2261(a)-(c); see also Calderon v. Ashmus, 523 U.S. 740, 742, 140 L. Ed. 2d 970, 118 S. Ct. 1694 (1998)* (explaining that a state must meet the criteria to invoke expedited review). In *Keel v. French, 162 F.3d 263, 267 n.1 (4th Cir. 1998)*, we explained that North Carolina had *not* opted-in to these procedural requirements. *See also Sexton v. French, 163 F.3d 874, 876 n.1 (4th Cir. 1998)* (same). At no time during the pendency of this case has North Carolina argued that it has complied with AEDPA's opt-in requirements, yet it bears the burden of establishing such compliance to be entitled expedited habeas review. *See, e.g., Hall v. Luebbers, 341 F.3d 706, 711 (8th Cir.*

2003); *Spears v. Stewart, 283 F.3d 992, 1012 (9th Cir. 2002)*; *High v. Head, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000)*. Instead, Judge Luttig correctly points out that Order No. 113 of the Fourth Circuit Judicial Council, which imposes *§ 2266*'s time limitations, applies to our disposition of all capital cases. However, as we explained in *Truesdale v. Moore, 142 F.3d 749, 758-60 (4th Cir. 1998)*, the scope and enforcement of this time limitation are entirely different from those under AEDPA itself. First, Order No. 113, unlike AEDPA, is a self-policing measure, not one enforceable by the state. In *Truesdale*, we made clear that this self-policing measure *may* be enforced by our Circuit Executive: "AEDPA gives *states* power . . . to enforce the time limits against courts of appeals 'by applying for a writ of mandamus to the Supreme Court,' *28 U.S.C. § 2266(c)(4)(B)*. By contrast, Order No. 113 provides simply that the *Circuit Executive* can monitor compliance with the timetable by inquiring into the reasons for the delay." *142 F.3d at 759*; *id. at 758* ("The Circuit Executive *may* seek an explanation of the reasons why the court has not complied with the time limitations." (emphasis added)); *see also Judicial Council Order No. 113 P 3* (Oct. 3, 1996) (stating that "the Circuit Executive is authorized to inquire into the reasons for any noncompliance"). Not only is the provision discretionary rather than mandatory, but in *Truesdale* we stated that if the "court needed to hold a case for a critical decision of the Supreme Court or the Fourth Circuit" that would be one reasonable explanation for noncompliance *if the Circuit Executive were to inquire. 142 F.3d at 758*. Here, the Circuit Executive has not inquired into the reasons for our noncompliance with this rule. If the Circuit Executive had inquired, we would most certainly have explained that while we attempt to resolve federal capital cases most expeditiously and in full compliance with Order No. 113, we do not do so at the expense of fair administration of justice, or at the expense of stifling good faith debate on the court -- including inhibiting any member of the court from writing to express his or her views. Indeed, we could point to the fact that this case has resulted in a most productive and spirited discussion among the judges of this court, as evidenced by the nine separate opinions we release today, and the proper administration of justice benefits from such a robust discourse even when some delay results. Under *Truesdale*, this is another reasonable explanation for our noncompliance had the Circuit Executive so inquired. In sum, it is premature to conclude that the court has violated Order No. 113 before the Circuit Executive has made the required inquiry and the appropriate authority has determined that the court had no valid reason for noncompliance.

NIEMEYER, Circuit Judge, dissenting from the judgment on the *McKoy* issue:

During the sentencing phase of trial, the State trial court submitted a form to the jury which, together with the trial court's instructions, instructed the jury that it could find or reject mitigating circumstances only by a unanimous vote. Of ten mitigating circumstances submitted to the jury, the jury found unanimously that three existed and seven did not. The jury then found unanimously that these mitigating circumstances were "insufficient to outweigh the aggravating circumstance or circumstances" and that the aggravating circumstances, considered in light of the mitigating circumstances, were "sufficiently substantial" to call for the imposition of the death penalty.

The United States Supreme Court granted a writ of certiorari and, in light of its decision in *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*, vacated the State court judgment and remanded the case to the North Carolina Supreme Court for reconsideration in light of *McKoy*. *Allen v. North Carolina, 494 U.S. 1021, 108 L. Ed. 2d 601, 110 S. Ct. 1463 (1990).*

The North Carolina Supreme Court reconsidered the trial record and found that the jury form and instructions had indeed violated the principles of *McKoy* but that, in light of a jury poll that had been conducted by the trial court, the error was "harmless beyond a reasonable doubt." *State v. Allen, 331 N.C. 746, 417 S.E. 2d 227, 228 (N.C. 1992)*. The United States Supreme Court denied Allen's petition for a writ of certiorari to review the North Carolina Supreme Court's decision on reconsideration. *Allen v. North Carolina, 507 U.S. 967, 122 L. Ed. 2d 775, 113 S. Ct. 1402 (1993).*

Allen raised the *McKoy* issue again in the district court on a petition for writ of habeas corpus, and the district court

concluded that the North Carolina Supreme Court's decision was not an unreasonable application of federal law. Accordingly, it denied the writ.

In *McKoy*, the Supreme Court applied its decision in *Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)*, to hold that the requirement in North Carolina that a jury find mitigating evidence by a unanimous verdict violates the U.S. Constitution "by preventing [each juror as] sentencer from considering all mitigating evidence." *494 U.S. at 435*. If a unanimous verdict on mitigating evidence were required, then only one juror could foreclose others' consideration of mitigating evidence, thus denying each juror the possibility of considering the mitigating evidence in casting a vote for the death penalty. *Id. at 443*. The Court explained that "the unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." *Id. at 439* (internal quotation marks and citations omitted). In sum, the Court concluded that "*each juror* must be allowed to consider all mitigating evidence in deciding . . . whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death." *Id. at 443* (emphasis added).

Applying *McKoy* to the circumstances in this case, the North Carolina Supreme Court concluded that the verdict form and the instructions given in connection with it violated the principles of *McKoy* and therefore constituted trial error. But the error, it found, had no effect on the trial because the trial court conducted a poll of the jurors which revealed that *the individual* jurors' votes were "unanimous as to each of the mitigating circumstances which the jury failed to find."

Allen, 417 S.E. 2d at 228. The court held that the error, therefore, "was harmless beyond a reasonable doubt." *Id.*

Because I conclude that the North Carolina Supreme Court's decision was not an unreasonable application of clearly established federal law as determined by the Supreme Court, I agree with the district court that the writ of habeas corpus must not be granted with respect to the *McKoy* error. *See 28 U.S.C. § 2254(d)(1).*

Because the North Carolina Supreme Court correctly identified the relevant Supreme Court standards, *compare Allen, 417 S.E. 2d at 228, with Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)*, the only question we must answer in applying *§ 2254(d)(1)* is whether the North Carolina Supreme Court's conclusion that the *McKoy* error was harmless beyond a reasonable doubt was an unreasonable application of *Chapman.*

A detailed examination of North Carolina's application of the *Chapman* standard shows that it was not unreasonable. Under the process followed by the State trial court, the *individual vote* of each juror can be determined on the record with respect to each mitigating circumstance. Because the individual jurors' votes on the mitigating circumstances were unanimous, the unconstitutional possibilities that could have resulted from a *McKoy* error never happened in this case. If the trial court had relied only on the verdict form returned by the jury, I would agree that we could not determine whether or not the *McKoy* error had tainted the verdict because we could not determine whether one juror or a few jurors had frustrated the finding of mitigation by other individual jurors so that the others could not consider their finding of mitigating evidence in voting on the death penalty. But the trial court's poll removed any doubt on this issue.

After the jury returned its verdict and the clerk read it in open court, the trial judge conducted a poll instructing the jury as follows:

> Members of the jury, at this time I am going to ask that Madam Clerk, when she is ready, poll each of you. This is the same procedure that we used on Monday. *You will be asked individually* as to your answers to the issues and as to the recommendation.

(Emphasis added). Each individual juror was then polled on the verdict form, including the answers to each of the mitigating circumstances, and asked, "Are these the answers to your issues" and "And do *you* still assent thereto?" (Emphasis added). In each case, the juror said "yes." Then each individual juror was asked whether the recommendation of the death penalty was "still *your* recommendation" (emphasis added) and whether the individual juror "still assented thereto." Again, in each case, the juror responded that this was his or her individual recommendation. Because each juror *individually* indicated that the vote on the ten mitigating factors was also his or her individual vote, the verdict on the mitigating factors was in fact unanimous, and the *McKoy* error did not deny any juror the opportunity to consider his or her individual finding of a mitigating circumstance.

Accordingly, I would conclude that the decision of the North Carolina Supreme Court finding the *McKoy* error harmless was not an unreasonable application of *Chapman*. The court clearly understood the holding in *McKoy*, and it determined whether any individual juror's views on mitigating evidence were suppressed by the unanimity

requirement, concluding that no individual juror's view on a mitigating circumstance was over-voted.

I am authorized to say that Judge Wilkinson concurs in this opinion dissenting from the judgment on the *McKoy* issue.

LUTTIG, Circuit Judge, concurring in the judgment and dissenting:

I do not join in any portion of the court's opinion. I do, however, agree with the conclusions reached by the court in Parts III, IV, and V of its opinion. For reasons that I will offer expeditiously (subject only to any time needed by my colleagues to prepare response), I dissent from the court's judgment on the *McKoy* issue.

This case was first argued before a panel of the court on September 25, 2002. The panel issued its decision and opinion on February 5, 2003, and a corrected opinion on February 14, 2003. Because more than 120 days had elapsed between the filing of the petitioner's reply brief on September 3, 2002, and the date that the panel issued its decision and opinion, the panel was in violation of the time limitations set forth in *28 U.S.C. § 2266(c)(1)(A)*, as adopted by this circuit's Judicial Council, at the time that it issued its decision and opinion.

We issued our order directing *en banc* consideration of the case on March 24, 2003, and the case was argued before the court *en banc* on June 4, 2003, almost a year ago.

Under the time limitations established by federal statute, *28 U.S.C. § 2266(c)(1)(B)(ii)*, as adopted by this circuit's Judicial Council, the *en banc* court was obligated to have

decided the case no later than July 22, 2003.* Thus, we are

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* In 1996, the Judicial Council of the Fourth Circuit adopted the time limitations set forth in *section 2266* for decision of habeas petitions in all capital cases, regardless of whether the state from which the capital case originates has opted-in or not. *See* Judicial Council Order No. 113 (4th Cir. Oct. 3, 1996); *see also Truesdale v. Moore, 142 F.3d 749, 758 (4th Cir. 1998)* ("Order No. 113 imposes on district courts and the circuit court a timetable for deciding petitions brought under *28 U.S.C. § 2254* and *2255* by defendants who are under sentence of death."). In *Truesdale*, this court rejected the claim that Order No. 113 conflicted with AEDPA (by adopting the time limitations of *section 2266* regardless of whether a state had opted-in and thereby "disrupting the statute's incentive structure") and emphasized that in adopting Order No. 113, the Judicial Council "simply exercised its recognized power to address . . . [the] problem of delay in collateral review of capital convictions and sentences." *Truesdale, 142 F.3d at 759*. Pursuant to *28 U.S.C. § 332(d)(2)*, orders of a circuit judicial council are binding on all judicial officers in the circuit, and may be enforced through contempt proceedings. Thus, under Order No. 113, which binds all of the judges in this circuit on pain of contempt, we *were obligated* to decide this case by the deadlines set forth in *28 U.S.C. § 2266*.

Contrary to Judge Gregory's assertion, it is not the case that we only violate the time limitations of Order No. 113 if the Circuit Executive has inquired into our delay and found it unjustified. An inquiry by the Circuit Executive, which Order No. 113 "authorizes," or even a determination after a contempt proceeding brought by the Judicial Council itself that we have no valid reason for violating these time limitations, for which *28 U.S.C. § 332(d)(2)* provides, is, at most, a predicate to reprimand, not a precondition to violation of Order No. 113. In fact, Judge Gregory's own acknowledgment of this court's "noncompliance" with Order No. 113, *ante* at 48-49 n.8, proves that even he accepts this to be so. Instead, it is plain that our statutory obligation to follow such orders exists irrespective of an inquiry by the Circuit Executive. *See 28 U.S.C. § 332 (d)(2)* ("All judicial officers and employees of the circuit shall promptly carry into effect *all* orders of the judicial council.") (emphasis added). In short, that the time limitations may be "self-policing" does not mean that they are not obligatory, just as the simple fact that the Circuit Executive has not yet inquired into our non-compliance with those limitations does not mean that we are not in violation of them.

already eight months beyond the date by which we were statutorily required to decide this case.

In my judgment, for reasons internal to the court, the opinion writing process is not likely to conclude in the immediately foreseeable future. However, it is clear at this time that the members of the court have come to rest on the disposition of the case.

Because the court has been in violation of the statutory time limitations governing the decision of this case for over eight months already, there is in my judgment no final set of opinions immediately forthcoming, and the members of the court have come to rest on the final disposition of the case, I believe that the only responsible course is for the court to issue those opinions that are final at this time, which opinions represent the court's decision in the case, and for any further separate opinions, including my own dissent, to be filed in due course following announcement of the court's judgment and decision. This is the course adopted by the court today, and, given the circumstances, it is a course of which I approve.

In order to expedite and facilitate the completion of the opinions for the court in this case, the State of North Carolina should promptly decide whether to move the court for reconsideration of today's decision and, if it chooses to seek reconsideration, file the appropriate papers, after which the petitioner may file responsive papers. If the state chooses not to move the court for reconsideration, it is my understanding that the majority judgment and opinion issued today, together with the separate opinions filed, will become the final judgment and set of opinions in the case, absent *sua sponte* action by a member of the court.

WILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, IV, and V of the court's opinion. I write separately to dissent from the court's judgment on the *McKoy* issue. To obtain habeas relief based on trial error, a habeas petitioner must establish that "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"* *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (2003)* (quoting *Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946))*. I respectfully disagree with the majority's conclusion that the error in this case warrants habeas relief. Given the jury's finding of two specific aggravating factors related to Allen's brutal and terrible murder of Trooper Worley, the mitigating circumstances that the faulty jury instruction prevented the jury from considering, and the three mitigating circumstances that the jury unanimously found to exist but unanimously found insufficient to outweigh the aggravating factors, I believe that one can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," *Kotteakos, 328 U.S. at 765*, and thus that the error did not have a "substantial and injurious effect or influence in

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* I note that Judge Gregory properly recognizes that the same *Brecht/Kotteakos* harmless error standard applies to both capital and noncapital proceedings. *See ante* at 47-48; *see also Rouse v. Lee, 339 F.3d 238, 254 (4th Cir. 2003)* (en banc) ("Any distinctions between the procedures required in capital and noncapital cases are primarily relevant to trial . . . ." (internal quotation marks omitted)), *cert. denied 158 L. Ed. 2d 248, 124 S. Ct. 1605, 72 U.S.L.W. 3567 (Mar. 8, 2004)*; *cf. Satterwhite v. Texas, 486 U.S. 249, 256-58, 100 L. Ed. 2d 284, 108 S. Ct. 1792 (1988)* (holding that the same *Chapman* harmless error standard applies on direct review of both capital and noncapital cases).

determining the jury's verdict," *Brecht, 507 U.S. at 637.* Accordingly, I respectfully dissent from the court's judgment on the *McKoy* issue.

GREGORY, Circuit Judge, dissenting from the court's opinion given in Part V:

In this Part, I write in dissent from the court's opinion in Part V.

Allen contends that his *Sixth* and *Fourteenth Amendment* rights were violated under *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).* The district court granted Allen a certificate of appealability on this issue. Thus, Allen has already made "a substantial showing of the denial of a constitutional right." *Slack, 529 U.S. at 484.* Accordingly, we can proceed to the substance of Allen's claim.

Allen contends that the prosecution violated his constitutional rights by using eleven of thirteen (84.6%) peremptory challenges against otherwise qualified African American members of the venire, while the venire consisted of only 24 (36.3%) African Americans. Allen filed a pretrial motion on July 19, 1985, requesting additional peremptory challenges for the defense because the prosecutor had a "propensity toward excluding blacks from trial juries by use of his peremptory challenges." (S.J.A. at 2.) The trial court denied this motion and proceeded with trial. Upon Allen's conviction and sentencing, Allen brought a direct appeal to the North Carolina Supreme Court, which the court dismissed. For the reasons articulated below, I would hold that the North Carolina Supreme Court's *Batson* analysis is contrary to clearly established federal law, as determined by the Supreme Court.

A

Before considering Allen's *Batson* claim on the merits, however, I first address whether defense counsel has adequately preserved a *Batson* objection. Allen's trial took place pre-*Batson*, when the governing law on racial discrimination in jury selection was *Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965).*[1] Under *Swain*, a defendant was required to "show the prosecutor's systematic use of peremptory challenges" to strike African American jurors "over a period of time." *Id. at 227.* Allen's attorneys attempted to meet this burden by filing a pretrial motion focusing on the State's history of excluding African American jurors. Because *Swain* asked a trial court to consider the government's use of strikes "over time" rather than in the specific case before the court, Allen's motion was denied before the prosecution had used a single peremptory challenge, and Allen never raised the objection again. Thus, the issue before this Court is whether a pretrial motion alleging that the prosecution has shown a propensity toward excluding African American jurors is sufficient to preserve a *Batson* claim on appeal.

The Supreme Court considered this question in *Ford v. Georgia, 498 U.S. 411, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991).* In *Ford*, an African American defendant, James A. Ford, filed a pretrial "'Motion to Restrict Racial Use of Peremptory Challenges,' alleging that the prosecutor . . . had 'over a long period of time' excluded black persons from juries. . . ." *Id. at 413-14.* Although the defendant failed to cite any legal authority, the Supreme Court interpreted his

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[1] Although *Batson* had not been decided at the time that Allen went to trial, *Batson* can be applied retroactively to cases on direct appeal. *See Teague v. Lane, 489 U.S. 288, 295, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).*

motion as effectively raising an objection under Swain. *Id. at 418*. The Court explained, "we think petitioner must be treated as having raised such a claim, although he certainly failed to do it with the clarity that appropriate citations would have promoted." *Id.* Following the trial court's denial of this motion, "the prosecution exercised 9 of its 10 peremptory challenges to strike black prospective jurors, leaving 1 black venire member on the jury." *Id. at 415*. Ford did not object to the use of peremptories as to any of these individual jurors. Rather, he waited and raised the *Swain* issue for a second time in a post-conviction motion for a new trial. *Id. at 416*.

The Supreme Court ruled that Ford's initial, pretrial motion was sufficient to preserve the *Batson* issue on appeal. Writing for a unanimous Court, Justice Souter stated:

> Both *Swain* and *Batson* recognized that a purposeful exclusion of members of the defendant's race from the jury selected to try him would work a denial of equal protection. . . . Because *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate **[**107]** a particular claim, it follows that a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well.

Id. at 420.

Following *Ford*, several of our sister circuits have elaborated on when a defendant should be deemed to have waived a *Batson* claim. In *Wilkerson v. Collins, 950 F.2d 1054, 1062-63 (5th Cir. 1992)*, the Fifth Circuit considered a

Batson claim brought by a defendant who failed to object to the prosecution's use of peremptory challenges before trial, during jury selection, or at any other time during the trial. The State argued that "notwithstanding the retroactivity of *Batson*, [the defendant] forfeited review as a matter of law by his failure to lodge a contemporaneous objection . . . ." *Id. at 1063*. The Fifth Circuit agreed, reasoning, "[a] contemporaneous objection would have provoked court consideration of this alleged misconduct at a point *before trial* where it could have been readily corrected." *Id.* (emphasis added). In *Lockett v. Anderson*, the Fifth Circuit reaffirmed this rule, explaining that "we find no evidence that any inquiry was made as to the prosecutor's rationale for excluding all black members of the jury pool. . . . Thus, we have no facts or arguments before us upon which to base a *Batson* inquiry." *230 F.3d 695, 706 (5th Cir. 2000)*. Similarly, the Second Circuit has focused on the fact that "the nature of the peremptory challenge mandates that any objection to its use be raised and ruled upon promptly." *McCrory v. Henderson, 82 F.3d 1243, 1247 (2d Cir. 1996)*. Thus, the court held, "the failure to object to the discriminatory use of peremptory challenges prior to the conclusion of jury selection waives the objection." *Id. at 1249*. Because the defendant "did not raise any challenge until three and one half months after the conclusion of jury selection, he forfeited his *Batson* claim." *Id.*

In each of these cases wherein the *Batson* claim was waived, the court relied on a defendant's failure to make *any* challenge -- either under *Batson* or *Swain*. The focus in each case was on whether the trial court had been afforded at least some minimal opportunity to address the constitutional objection, regardless of the form of that objection.

Consistent with this reasoning, the Eleventh Circuit has specifically held: "In cases . . . where the trial took place pre-

Batson, a properly made *Swain* claim made in a pretrial motion is treated as a timely made *Batson* objection for the purpose of preserving the *Batson* issue for appeal." *Cochran v. Herring, 43 F.3d 1404, 1409 n.7 (11th Cir. 1995).* In *Cochran*, just as in the present case, the defendant, "before the actual striking of jurors began," filed a *Swain* motion based on the prosecution's history of systematically striking African American jurors. *Id. at 1406.* The trial court denied the motion, and defense counsel never raised the issue again, even though the prosecution eventually struck "seven of the nine black members of the venire panel." *Id.* Despite Cochran's failure to object to the use of peremptory challenges as to any specific juror, the Eleventh Circuit held that the pretrial *Swain* motion on its own was sufficient to preserve the *Batson* issue. *Id. at 1409-10. See also Wright v. Hopper, 169 F.3d 695, 708-09 (11th Cir. 1999)* (holding that defendant was barred from bringing a *Batson* claim because he failed to raise such a claim at "trial, or on direct appeal, or in his state coram nobis proceeding").

Allen, like the defendants in *Ford* and *Cochran*, presented the trial court with a pretrial motion arguing that "the Prosecutor has shown a propensity toward excluding blacks from trial juries by use of his premptory [sic] challenges in cases wherein the Defendant is a black person, and the Defendant expects that the Prosecutor will follow that practice in this case." (S.J.A. at 2.) With this language, Allen effectively raised an objection under *Swain. See Ford, 498 U.S. at 418.*

In suggesting a remedy, Allen requested that the trial court grant him additional peremptory challenges in order to blunt the government's efforts at discrimination. (S.J.A. at 1.) The better remedy might have been to directly prohibit the prosecution from using its peremptories in a racially discriminatory manner. However, regardless of the remedy

sought, the fact remains that Allen properly raised the *Swain* issue to the trial court. As the Second Circuit explained:

> If the objection is raised during jury selection, the error is remediable in any one of a number of ways. Challenges found to be abusive might be disallowed; if this is not feasible . . . additional jurors might be called to the venire and *additional challenges granted to the defendant*; or in cases where those remedies are insufficient, the jury selection might begin anew with a fresh panel. If, on the other hand, a *Batson* objection may be raised after the jury has been sworn and trial has begun, there can be no remedy short of aborting the trial.

McCrory, 82 F.3d at 1247 (emphasis added) (internal citations omitted). In short, the focus is not on whether a defendant requested a particular kind of relief, but rather, whether he provided the trial court with an opportunity to correct the constitutional violation before the jury was empaneled. In this case, Allen's pretrial motion achieved this result, and therefore it is sufficient to preserve Allen's *Batson* claim.[2]

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[2] I note that the Third Circuit has recently considered a case in which, unlike the case at hand, no adequate contemporaneous objection preserved the *Batson* challenge. *See Riley v. Taylor, 277 F.3d 261, 274 (3d Cir. 2001) (en banc)*. However, the Third Circuit reasoned that since "the last state court to be presented with a particular federal claim reached the merits, it removed any bar to federal-court review that might otherwise have been available." *Riley ,277 F.3d at 274* (quoting *Ylst v. Nunnemaker, 501 U.S. 797, 801, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991))*. In *Riley*, the court considered the claim of a defendant who failed to raise either a *Swain* or a *Batson* objection at trial. *Id.* The Delaware Supreme Court, however, reviewed Riley's *Batson* claim on the merits, both on direct appeal and as

In sum, consistent with the Supreme Court and each circuit to have considered the question, I would find that Allen's *Swain* motion is a sufficient contemporaneous objection to preserve the *Batson* issue for this habeas petition. Thus, I now turn to the substance of Allen's *Batson* claim.

B

In conducting a *Batson* hearing, a court must first determine whether a defendant can show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor used the challenges to remove members of the defendant's race from the venire; and (3) other facts and circumstances surrounding the proceeding raise an inference that the prosecutor discriminated in his or her use of peremptory challenges. *Batson, 476 U.S. at 96-97*; *Keel v. French, 162 F.3d 263, 271 (4th Cir. 1998)*. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson, 476 U.S. at 97*.

Without considering any of Allen's evidence of discrimination, the North Carolina Supreme Court denied Allen's *Batson* claim. In its ruling, the court relied wholly on the fact that the majority of the seated jurors were African American, and dismissed the claim. *See Allen, 372 S.E. 2d at 862*. Reviewing the facts as presented in the record, I find that this denial "was contrary to, or involved an unreasonable

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presented in post-conviction motions. *Id.* The Third Circuit held that, although the defendant failed to raise the claim to the trial court, "Riley's *Batson* claim [was] not procedurally barred . . . ." *Id. at 275*. In Allen's case, the North Carolina Supreme Court similarly considered and rejected Allen's *Batson* claim on the merits. *See State v. Allen, 323 N.C. 208, 372 S.E. 2d 855, 861-62 (N.C. 1988)*.

application of clearly established Federal law, as determined by the Supreme Court." *Frye v. Lee, 235 F.3d at 903*; *see also Keel, 162 F.3d at 271* (outlining the elements of a *Batson* claim). The *Equal Protection Clause* forbids a prosecutor from challenging any single potential juror solely on account of that individual's race. *Batson, 476 U.S. at 89*. If the prosecution strikes one African American juror for discriminatory reasons, that alone is sufficient to support a *Batson* challenge, even if other African Americans remain on the jury. By focusing *solely* on the racial make-up of the jury that finally heard Allen's case, the North Carolina Supreme Court never analyzed Allen's evidence of discrimination, in plain contravention of clearly established federal law. Although it was appropriate to take into consideration evidence of who was seated, the court should have focused on those members of the venire who were *excluded* from the jury for allegedly unconstitutional reasons as *Batson* requires.

As contained in the record, Allen's evidence of discrimination is compelling. Out of 66 prospective jurors on the venire, 38 (57.5%) were Caucasian, 24 (36.3%) were African American, and 4 (6%) were of another race. (J.A. at 57.) The prosecution used 84.6% of its peremptory challenges to exclude African Americans from the jury, even though African Americans only represented 36.3% of the venire presented.[3]

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[3] In addition to this statistical evidence, circumstantial evidence in the record also supports a finding that the prosecution struck some jurors on the basis of race. For example, as jury selection began, the prosecution learned that Juror Thorne, a Caucasian woman in Seat 9, had known defense counsel "through the years as he was growing up," and also knew his parents well. (Tr. of Proceedings, *Allen v. French*, 5:97-HC-959-H, at 103 (N.C. Super. Ct. Nov. 8-13, 1985)). In addition, Thorne had read newspaper accounts of the shooting and pre-trial activity. (Tr. at 99.) Thorne also had a daughter

This Court has previously recognized that a prima facie case of a *Batson* violation can be affirmatively made solely by looking to the statistical evidence of who was peremptorily struck by the prosecution. In *Howard v. Moore, 131 F.3d 399, 407 (4th Cir. 1997) (en banc)*, we held that a "prosecutor's striking of six out of the seven black prospective jurors constituted a prima facie case of discrimination. Judge Williams, writing for the *en banc* court, logically concluded that strong statistical evidence -- without more -- *is enough* to establish a *prima facie* case of intentional discrimination under *Batson*.[4] Similarly, in

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and two grandchildren, (Tr. at 129), and thus might have been especially sympathetic to the testimony of Allen's mother. Despite the possibility that Thorne would be influenced by these factors, the government left her on the jury.

The decision to keep Juror Thorne is particularly suspect when compared to the prosecutor's decision to strike Juror Davis, an African American woman in Seat 1. On the record, Davis stated that she knew of one of the defense attorneys, Mr. Graham, but that she and Graham were not friends or acquaintances, and that Graham had never done any legal work for her or any member of her family. (Tr. at 348-49). When asked to clarify what she did know about Graham, Davis stated, "Nothing other than knowing he works up here and seeing him at the store." (Tr. at 348.) Given the prosecution's comfort with Thorne's relationship with defense counsel, it is implausible that the prosecutor was concerned about Davis' tenuous and casual connection with that same lawyer. Additionally, unlike many other jurors, Davis was never asked about her marital status, whether she had any children, or where she might be employed.

[4] The evidence in *Howard* was as follows: "After voir dire, forty-two persons were qualified as jurors, only seven of whom were black. The prosecutor struck six of the seven black prospective jurors and four of the thirty-five white prospective jurors, resulting in a jury of eleven white jurors and one black juror. Howard moved to quash the panel pursuant to *Batson*. The trial court found, and we agree, that the prosecutor's striking of six out

United States v. Mitchell, this Court found that when "the prosecution used seven of its ten peremptories to strike black veniremen" and when "a previous jury panel had to be dismissed because of racially inflammatory remarks made in the jurors' lounge" by some of the jurors, "a prima facie *Batson* violation has been made." *877 F.2d 294, 302 (4th Cir. 1989)*. Accordingly, "when determining whether a prima facie case of discrimination has been shown, the district court may consider the proportion of black jurors *stricken* compared with the composition of the venire." *United States v. Joe, 928 F.2d 99, 103 (4th Cir. 1991)* (citing *Batson, 476 U.S. at 97*) (emphasis added).

Despite the evidence that race was a factor in the prosecution's use of peremptory challenges, the government insists that no *Batson* violation exists because the jury was 58% African American.[5] (Br. of Appellee, at 23). In addition, **[**117]** the government emphasizes that, in leaving seven African Americans on the jury, "the State did not use all of its peremptory challenges." (Br. of Appellee, at 22). At most, however, this evidence only shows that race may not have been a determinative factor *every* time an African American juror was called to the jury box. It is indisputable that a racially biased use of a peremptory challenge against even a single potential juror violates *Batson*. Therefore, a court is not relieved of its duty to consider all of the relevant evidence simply because some African Americans were

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of seven black prospective jurors constituted a prima facie case of discrimination." *Howard, 131 F.3d at 407*.

[5] The jury that was initially empaneled was 58% African American. Because one juror was excused for cause mid-trial, the jury that decided Allen's case was 50 African American.

seated on the jury, or because *Batson* was observed *some* of the time.

Allen is entitled to habeas relief because the North Carolina Supreme Court flatly refused to consider all of the facts and circumstances of discrimination that Allen proffered; instead, it summarily concluded that "the defendant has not made a prima facie showing of racially motivated peremptory challenges when the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black." *Allen, 372 S.E. 2d at 862.* The court's reasoning, in its entirety, was as follows:

> In this case the jury before which the defendant was tried consisted of seven black persons and five white persons. Of the seventeen black veniremen tendered to the State (including alternates), it accepted seven or forty-one percent. In *State v. Abbott, 320 N.C. 475, 358 S.E. 2d 365 (N.C. 1987)*, we held that the defendant did not make a prima facie case of racially motivated peremptory challenges when the State peremptorily challenged three of five black veniremen tendered to it. In *State v. Belton, 318 N.C. 141, 347 S.E. 2d 755 (N.C. 1986)*, we held an inference that racially motivated peremptory challenges did not arise when the State peremptorily challenged six of the twelve black jurors tendered. In that case the State peremptorily challenged five white jurors. We hold pursuant to *Abbott* and *Belton* that the defendant has not made a prima facie showing of racially motivated peremptory challenges when the State accepted seven of the seventeen

> black veniremen tendered and the majority of the jury which tried the defendant was black.

Id. In relying on the ratio of African American jurors seated to African American jurors tendered, the North Carolina Supreme Court has turned the *Batson* analysis on its head. Indeed, the *Batson* Court held that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *476 U.S. at 95* (quoting *Arlington Heights v. Metro Hous. Dep't Corp., 429 U.S. 252, 266 n.14, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)).*

The Court further outlined the precedential underpinnings of this rule, which stretch back to the nineteenth century case of *Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880).* The *Batson* Court explained:

> In holding that racial discrimination in jury selection offends the *Equal Protection Clause*, the Court in *Strauder* recognized . . . that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." . . . But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.

476 U.S. at 85 (internal citation omitted). The Court observed that discrimination in jury selection reached beyond the defendant on trial, and noted that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror" as well. *Id. at 87* (citing *Strauder, 100 U.S. at 308*). For these reasons, the Court concluded that "the rule of law will be

strengthened if we ensure that *no citizen* is disqualified from jury service because of his race." *Id. at 99* (emphasis added).

In fact, courts, including this court, interpreting *Batson* around the time of the North Carolina Supreme Court's decision in the instant case (1988) emphasized *Batson's* focus on the excluded juror. *See, e.g., Joe, 928 F.2d at 103* ("The district court erred in ruling that a *Batson* violation did not occur since members of the defendants' racial group were seated on the jury."); *United States v. Lane, 866 F.2d 103, 105 (4th Cir. 1989)* ("As Lane correctly points out, striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors."); *Chisolm v. State, 529 So. 2d 635, 637 (Miss. 1988)* ("Among the few clues *Batson* gives [regarding] how we are to enforce the new claim it announces, we are directed to concentrate on the juror excluded, not those accepted . . . ."); *Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986)* (quoting *Arlington* passage from *Batson* and stating that "nothing in *Batson* compels the district court's conclusion that constitutional guarantees are never abridged if all black jurors but one or two are struck because of their race").

Under the rule proposed by the state court in Allen's case, however, the State could discriminate against some African American jurors (three out of five, for example), as long as others made it through the jury selection process unchallenged. Hypothetically, given this reasoning, Allen's *Batson* challenge would have failed even if the State had used all of its strikes against African Americans because seven African Americans were seated on the jury.

An additional problem with the North Carolina test is that evidence of who is seated on a jury is less probative than evidence of who is struck. A prosecutor only has a limited ability to control who is eventually seated on the jury. The defendant's use of strikes, the court's rulings on motions for cause, and the role of chance in who is pulled from the venire, all greatly affect the final composition of the jury. In light of these factors, a prosecutor seeking to exclude jurors on the basis of race can only do so much. As a result, the best and most direct evidence in a *Batson* challenge is evidence of whom the government chose to strike, because that is something over which the prosecutor has complete and undiluted control.

The North Carolina Supreme Court effectively acknowledged that it erred in applying *Batson* to Allen's case, when, in a later ruling, the court recognized that "the acceptance rate of minorities by the State is relevant to our inquiry, *but it is not dispositive." State v. Smith, 328 N.C. 99, 400 S.E. 2d 712, 724 (N.C. 1991)* (emphasis added). The *Smith* court explained:

> When a district attorney uses all his peremptories, discriminatorily or not, he will be forced to accept replacement jurors regardless of their race. Under such facts the acceptance rate would have little to do with the district attorney's actual intent to discriminate. Further, the presence of an intent to discriminate may be proved by a number of factors or circumstances, not just the acceptance rate of black jurors.

Id. Similarly, this Court has ruled, "Although the [trial] court was entitled to consider the fact that the final jury included black citizens, it was not entitled to allow the presence or

absence of other black jurors to resolve the question of whether [the civil defense attorney] was motivated by race in the exercise of this particular strike." *Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995).*

Because of *Batson's* focus on a "single invidiously discriminatory governmental act," *476 U.S. at 95*, this Court has held that a "district court erred in ruling that a *Batson* violation did not occur since members of the defendants' racial group were seated on the jury." *Joe, 928 F.2d at 103.* Writing for the majority, Judge Wilkins astutely observed, "while the fact that black jurors were seated is entitled to substantial consideration, it is not dispositive of this issue and does not preclude a finding that defendants established a prima facie violation of *Batson." Id.* Along the same lines, we have previously held that "the racial composition of the actual petit jury is not dispositive of a *Batson* challenge . . . ." *United States v. Grandison, 885 F.2d 143, 147 (4th Cir. 1989)* (Wilkinson, J., writing for the majority). That is, we have unequivocally ruled that an allegation of a *Batson* violation cannot be rebutted solely by relying on who was eventually seated on the jury.

Yet in approving of the North Carolina Supreme Court's *Batson* analysis, the majority curiously departs from *Batson* and its progeny and also appears to contravene the Supreme Court's most recent equal protection jurisprudence, which rests largely upon the concept of racial balancing and proportionality. *See e.g., Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)* (majority and dissenting opinions discuss the ineffectiveness and unconstitutionality of racial balancing and proportional racial representation).

The majority devotes *much* "attention to numbers" by placing undue emphasis on the number of African American

jurors before which Allen was tried as justification for foreclosing Allen's *Batson* challenge. *Contra id. at 2343* ("'Some attention to numbers,' without more, does not transform a flexible . . . system into a rigid quota." (citation omitted)). For instance, the majority writes:

> The North Carolina Supreme Court rejected the *Batson* challenge based on the facts that (1) "the State accepted seven of the seventeen black veniremen tendered" and (2) "the majority of the jury which tried the defendant was black." The court concluded that in the circumstances where the State "accepted seven or forty-one percent" of the African-American members of the venire, an "inference" of racial motivation did not arise, and the defendant failed to make a *prima facie* case that the State's peremptory challenges were racially motivated.

Ante at 11 (citations omitted). Speciously, the majority characterizes as "selective" my use of Allen's proffered statistics demonstrating the prosecution's overwhelming and disproportionate use of its peremptory strikes to remove African American jurors. Yet, in response, the majority posits that those statistics support the "opposite inference." *Ante* at 16.

First, I note that if the proffered statistics "support" competing inferences, a *prima facie* case exists, and thus merits further fact finding, contrary to the majority's conclusion that no *prima facie* case exists. *See Ante* at 15. Second, I take issue with the majority's conclusion that no inference of discrimination arose under these facts because "the percentage of African-Americans accepted by the State and seated on the jury - 58% (7 of 12) -- exceeded the

percentage of African-Americans on the venire -- 37% (24 of 65) -- and exceeded the percentage of African-Americans in the county -- 48%." *Ante* at 16. Such a conclusion suggests that because roughly half of the petit jury was black, the exclusion of even one juror for racially prejudiced reasons is constitutional. This would create a "quota" system whereby a jury comprised of a fixed number of minorities, could never violate the *Equal Protection Clause*. Under such a system, no equal protection challenge could succeed against a jury where the racial makeup thereof is proportionate to or greater than the racial makeup of the county in which it sits. Relying upon a voir dire process that produces a jury that consists of a specified number of jurors of a particular race -- roughly half, for example -- is no doubt the "functional equivalent of a quota." *Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317-18, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)*. The Supreme Court has clearly held that quotas and race-balancing are inappropriate and unacceptable in the equal protection context. *Bakke, 438 U.S. at 317-18*; *see also Grutter, 123 S. Ct. at 2371* (Kennedy, J., dissenting).

The majority goes even further by concluding that no harm was done because "in accepting these African-American jurors, the State left unused peremptory challenges that were available to it." *Ante* at 15.[6] I suppose that because only a few African American venire members were excluded while others remained, the Defendant and those selected have no cause to complain? It seems that the majority counsels us to ignore the harm worked upon all members of

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[6] The majority also notes that "only on Seat 3 did the State's exercise of a peremptory challenge result in the race of a juror changing from African-American to white. [and] concluded that this 'pattern' supports an inference that discrimination against African-Americans was not a reason for the State's exercise of peremptory challenges." *Ante* at 15.

society (minority and non-minority alike) by the exclusion of even one juror on the basis of race, so long as a racial balance is achieved in the process. I doubt that those excluded and deprived of their constitutional right to serve upon a jury "all by reason of their skin color will surely understand." *Grutter, supra, at 2349* (Scalia, J., dissenting).

By ignoring evidence that establishes a prima facie case of discrimination, and by relying solely on evidence that, standing alone, cannot possibly be dispositive, the North Carolina Supreme Court has applied a test that brazenly disregards the Supreme Court's ruling in *Batson*. I would therefore remand the case to the district court so that it may, in its discretion, hold a hearing on petitioner's *Batson* claim (and if warranted by that hearing, order a new trial) or return the case to the state trial court on a conditional writ of habeas corpus so that the state court can conduct its own inquiry. *See Tankleff v. Senkowski, 135 F.3d 235, 250 (2d Cir. 1998)*; *see also Howell v. Barker, 904 F.2d 889, 896 (4th Cir. 1990)* (granting writ conditioned on failure of state to retry defendant by date set by district court).

For these reasons, I respectfully dissent from the court's opinion in Part V.

APPENDIX C

Filed: December 19, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-HC-959-H

TIMOTHY LANIER ALLEN, Petitioner,

v.

R.C. LEE,[1] Warden,
Central Prison,
Raleigh, North Carolina, Respondent.

ORDER

This matter is before the court on the Petition for Writ of Habeas Corpus, as supplemented and amended, filed pursuant to 28 U.S.C. § 2254 on behalf of Timothy Lanier Allen ("Allen"). The respondent has answered the petition and moved for summary judgment. These matters are ripe for ruling.

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[1]James B. French, former Warden of Central Prison, was named as Respondent in the petition. Since the petition was filed, R. C. Lee has replaced James B. French as Warden.

STATEMENT OF THE CASE

A. Background Facts

Allen was tried and convicted of first degree murder at the November 4, 1985, criminal session of Halifax County Superior Court for the May 14, 1985, murder of Raymond E. Worley, a member of the North Carolina State Highway Patrol. The following facts are summarized from the opinion of the North Carolina Supreme Court affirming Allen's conviction and sentence. *See State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988) ("*Allen I*").

Trooper Worley was patrolling I-95 in Halifax and Northampton Counties during the early morning hours of May 14, 1985. At approximately 5:11 a.m., Trooper Worley radioed his dispatcher that he was stopping two vans with Maryland license tags just north of Highway 561. The dispatcher received no further radio communication from Trooper Worley. A short time later, the dispatcher of the Enfield Police Department enlisted the assistance of two officers from the division of motor vehicle enforcement in locating Trooper Worley. After driving approximately twelve miles on I-95, the officers located Trooper Worley's car sitting on the right hand side of the road. A white van was parked in front of the patrol car. The officers found Trooper Worley sitting in the driver's seat of his patrol car with his body leaning to the right and his head tilted downward. Blood covered his shirt and was spattered across the right side of his head and his right arm and leg. The driver's side window of the car was shattered.

Trooper Worley was pronounced dead at the scene. A subsequent autopsy revealed that Trooper Worley had suffered three gunshot wounds. The bullets found in his

body were those of a .38 caliber pistol. A search of the scene of the shooting produced a .22 caliber pistol and an identification card of Antonio Worrell.

At approximately 6:02 a.m. on May 14, 1985, Sergeant Everett Horton of the North Carolina State Highway Patrol received a call about Trooper Worley. He immediately began organizing a manhunt and alerted law enforcement officials in the surrounding counties. Shortly thereafter, a report was received of an abandoned black van near the intersection of Highway 903 and U.S. 301 and of a man walking down U.S. 301 in the area of the abandoned van. Around 6:20 a.m., a member of the North Carolina State Highway Patrol spotted a man walking along the highway that matched the description of the man seen walking in the area of the abandoned van. The officer pulled up behind the man, who later was identified as Alex Allen[2], and ordered him to lie on the ground, at which point he was handcuffed and taken into custody. A search of Alex Allen revealed that he was carrying a .38 caliber pistol.

A short time later, at approximately 7:15 a.m., law enforcement officers tracked a group of three men to an abandoned house where they were arrested and taken into custody. The three men were identified as Antonio Worrell, Mack Green and Timothy Allen. The three men were transported to the Halifax County Sheriff's Department, where Alex Allen also was being held. After interrogating Worrell, Green and Alex Allen, E.C. Warren, a detective with the Halifax County Sheriff's Department, began interrogating Allen. At 1:50 p.m., Allen was brought into an interview room. After Allen was advised of his *Miranda*

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[2] Alex Allen is Timothy Allen's brother.

rights and signed a waiver, he was interrogated. Allen ultimately confessed that he shot Trooper Worley.

In his confession, Allen stated that he left Washington, D.C., on May 11, 1985, with Alex Allen, Antonio Worrell and Mack Green in a stolen black van. The four men traveled to Wallace, North Carolina, where they stayed with friends until around midnight on May 13, 1985, when they started their return to Washington. On their way, they broke into a store in Pender County and stole beer, cigarettes and a .22 and a .38 caliber pistol. Allen kept the .38 caliber pistol and gave the .22 caliber pistol to Antonio Worrell. Later, they stopped again to steal a white van from a car lot. Allen and his brother got into the white van and followed Antonio Worrell and Mack Green in the black van.

As they headed north on I-95, a patrol car pulled around the van driven by Allen and stopped the van driven by Antonio Worrell. At that time, Allen pulled his van over to the shoulder of the highway and parked behind the patrol car. Allen stated that he saw the trooper get out of the patrol car and speak to Antonio Worrell, and then saw Antonio Worrell follow the trooper back to the patrol car. The trooper motioned for Allen to get out of the van and come to the patrol car. As he approached the patrol car, the trooper reached over to unlock the door. Allen then fired at least twice at the trooper. The four men fled in the black van. They were found hiding near an abandoned house when they were arrested.

After he gave his statement to Mr. Warren, Allen read the written version and signed it as being the truth to the best of his knowledge and belief. Allen's statement was introduced by the state at trial and read into evidence. However, at the close of the state's evidence, Allen took the

stand and denied shooting Trooper Worley. Allen testified that, following a meeting at the patrol car between himself, Antonio Worrell and the trooper, he returned to the black van to get his license, at which point he heard shots fired. After the trooper was shot, he and his companions drove off.

Allen was indicted on charges of first degree murder and three counts of felonious possession of stolen goods. The jury found him guilty on all charges. After a sentencing hearing, the jury found two aggravating circumstances — that the murder was committed to avoid lawful arrest and that the murder was committed against a law enforcement officer in the performance of his duties — and three of the ten mitigating circumstances submitted — that Allen had no history of use of deadly weapons, that Allen expressed remorse about the death of Trooper Worley, and that Allen completed his high school equivalency education by completing his GED. The jury recommended a sentence of death. The court entered judgment accordingly.

B. Post-Conviction History

On direct appeal, the North Carolina Supreme Court found no error in either the guilt phase or the sentencing phase of Allen's trial and affirmed his conviction and sentence. *Allen I*, 323 N.C. at 208, 372 S.E.2d at 855. The United States Supreme Court vacated the judgment and remanded to the North Carolina Supreme Court for reconsideration in light of *McKoy v. North Carolina* , 494 U.S. 433, 110 S. Ct. 1227 (1990).[3] *See Allen v. North*

[3] In *McKoy*, the Supreme Court held that North Carolina's capital jury instruction requiring unanimity in finding mitigating circumstances was unconstitutional.

Carolina, 494 U.S. 1021, 110 S. Ct. 1463 (1990). On remand, the North Carolina Supreme Court found the *McKoy* error in Allen's case harmless beyond a reasonable doubt. *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227 (1992) (*Allen II*). The United States Supreme Court denied *certiorari*. *Allen v. North Carolina*, 507 U.S. 967, 113 S. Ct. 1402 (1993).

Allen filed a motion for appropriate relief (MAR) in Halifax County Superior Court on June 1, 1994. The state filed a motion for partial summary judgment on the grounds that certain of the claims raised in Allen's MAR were procedurally barred. Both Allen and the state sought and received discovery in state post-conviction proceedings.

After conducting a hearing, the state court granted the state's motion for partial summary judgment and dismissed certain claims on grounds of procedural bar. The North Carolina Supreme Court denied review. *See State v. Allen*, 342 N.C. 194, 462 S.E.2d 528 (1995). Thereafter, an evidentiary hearing was convened on the remaining claims asserted in the MAR. Following the hearing, Allen filed an amendment to his MAR to add and narrow claims to conform to the evidence presented at the hearing. On July 24, 1996, following the enactment of N.C. Gen. Stat. § 15A-l415(f), which provides for certain post-conviction discovery, Allen filed a motion for post-hearing discovery. By order dated August 23, 1996, the state court denied Allen's remaining and amended claims and denied Allen's motion for discovery. The North Carolina Supreme Court denied review, *State v. Allen*, 345 N.C. 644, 483 S.E.2d 179 (1997), and the United States Supreme Court denied *certiorari*. *Allen v. North Carolina*, 522 U.S. 846, 118 S. Ct. 131 (1997).

On December 4, 1997, Allen filed a motion for appointment of counsel in this court along with a request for stay of execution. The court granted Allen's request for a stay of execution and appointed counsel to represent him. The court directed Allen to file his petition for writ of habeas corpus by February 9, 1998, which he did. The respondent filed an answer to the petition and a motion for summary judgment on April 9, 1998. Allen filed a timely response in opposition to the respondent's motion for summary judgment.

Also on April 9, 1998, Allen filed a motion for leave to conduct discovery. Allen's discovery motion was referred to the Honorable Wallace W. Dixon, United States Magistrate Judge. Following a hearing before Magistrate Judge Dixon, Allen's request for leave to conduct discovery was denied. Meanwhile, Allen continued to litigate his entitlement to post-conviction discovery pursuant to N.C. Gen. Stat. § 15A-l415(f) in state court and ultimately prevailed.

In the fall of 1998, Allen received additional discovery from the state. Thereafter, on November 30, 1998, Allen filed a second motion for appropriate relief in the Halifax County Superior Court containing three claims for relief. On December 1, 1998, Allen filed a motion for leave to amend the petition to assert the same three claims in this action, a motion for funds for an expert psychiatrist, and a motion to hold these proceedings in abeyance. Allen also supplemented his response to the respondent's motion for summary judgment. The court granted Allen's motion for leave to amend the petition and motion for funds for an expert psychiatrist, but denied Allen's motion to hold these proceedings in abeyance. The respondent then filed an answer and motion for summary judgment as to the amended

claims. Thereafter, this action was held in abeyance pending the Supreme Court's decision in *Williams v. Taylor*. After the Supreme Court issued its decision in *Williams*, the parties submitted supplemental memoranda to the court.

While this action was held in abeyance, the state court adjudicated the claims asserted in Allen's second MAR. By order entered on March 31, 2000, the state court denied Allen's claims in his second MAR. The North Carolina Supreme Court denied Allen's petition for *certiorari* on October 5, 2000.

On January 5, 2001, Allen filed a second motion for leave to amend the petition, which motion was allowed. The respondent filed a timely response to the amendment on May 18, 2001.

These matters are now ripe for ruling.

DISCUSSION

A. AEDPA's Standard of Review

The court's review of Allen's claims is governed by 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104, 132, 110 Stat. 1214 (1996). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The phrase "'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions *as of the time of the relevant state-court decision*." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000) ("*T. Williams*") (emphasis added). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413, 120 S. Ct. at 1523. A state court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411, 120 S. Ct. at 1522.

Only after a petitioner establishes that the state court's adjudication of his claims was "contrary to" or an "unreasonable application of" clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence may a federal court proceed to review a state court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676 (4th Cir.), *cert. denied*, 122 S. Ct. 318 (2001). Similarly, if a petitioner properly presented a claim to the state court, but the state court did not adjudicate the claim on the merits, the federal court must review questions of law and mixed questions of law and fact *de novo*. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 822 (2001).

Finally, the factual findings of the state court are presumed to be correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting this presumption of correctness by clear and convincing evidence. *Id.*

B. Preliminary Matters

1. Timeliness of Petition

In the answer to the petition, the respondent argues that Allen's petition is untimely and is therefore barred by the statute of limitations set forth in 28 U.S.C. § 2244. The respondent previously raised this issue in opposing Allen's request for a stay of execution. The respondent argues that the court should exclude from AEDPA's tolling provisions the periods of time between the state court's denial of post-conviction relief and Allen's filing of a petition for writ of *certiorari*. The respondent acknowledges that this court already has rejected this argument and determined that Allen's petition is timely, but states that this defense is being renewed for the purpose of appellate review. This court is

satisfied that the petition was timely filed within the time period allowed pursuant to 28 U.S.C. § 2244. *See Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999) (rejecting the "gap" theory and holding that the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court, is tolled from the limitations period), *cert. denied*, 528 U.S. 1197, 120 S. Ct. 1262 (2000).

2. Exhaustion and Procedural Bar

The respondent contends that Allen has failed to exhaust his state court remedies as to Claims VIIA, VIIC, and VIIE and that, because these claims would be procedurally barred if now presented to the state court, they are procedurally defaulted. The respondent also contends that Claims XII, XIII, XIV and XV are procedurally defaulted.

Because principles of comity dictate that the state must be given the first opportunity to correct constitutional errors in state court criminal proceedings, a federal court may not grant habeas relief to a person in state custody unless the person first has exhausted his state remedies by presenting his claims to the highest state court. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732 (1999). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Once a question concerning exhaustion has been raised, it is the petitioner's burden to demonstrate that state remedies have been exhausted. *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

In determining whether a claim has been exhausted, the court must consider "not merely whether the claim has

been placed before the highest state court, but also whether the state court has been given a fair opportunity to review the claim." *Baker v. Corcoran*, 220 F.3d 276, 291 (4th Cir. 2000) (citing *O'Sullivan*, 526 U.S. at 848, 119 S. Ct. at 1734), *cert. denied*, 121 S. Ct. 1194 (2001). To meet this requirement, a petitioner must comply with all state court procedures for the presentation of claims. *Mallory*, 27 F.3d at 995-96. However, notwithstanding a petitioner's failure to exhaust state court remedies, a petition for writ of habeas corpus may by denied on the merits. 28 U.S.C. § 2254(b)(2).

Under the doctrine of procedural default, a federal court is precluded from reviewing the merits of any claim that was found procedurally barred by the state court on adequate and independent state grounds. *Coleman v. Thompson*, 501 U.S. 722, 731-32, 750, 111 S. Ct. 2546, 2555, 2565 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043 (1989). A state rule is "adequate" if it is firmly established and regularly and consistently applied by the state court. *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987 (1988); *McCarver v. Lee*, 221 F.3d 583, 588 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 809 (2001). A state rule is "independent" if it does not depend upon a federal constitutional ruling. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000) (citing *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S. Ct. 1087, 1092 (1985)), *cert. denied*, 121 S. Ct. 822 (2001).

A federal court also may apply the doctrine of procedural default when a petitioner has failed to exhaust state court remedies and the claim would be barred under state law if the petitioner now presented the claim to the state court. *Coleman*, 501 U.S. at 735 n.1, 111 S. Ct. at 2557; *Williams v. French*, 146 F.3d 203 (4th Cir. 1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061 (1999).

Procedurally defaulted claims can be reviewed by a federal habeas court only if the petitioner demonstrates cause and prejudice, or that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. To show cause, a petitioner must show that something external to the petitioner prevented him from complying with the state procedural rule:

> "cause" . . . must be something *external* to the petitioner, something that cannot fairly be attributed to him: "We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."

Id. at 753, 111 S. Ct. at 2566. (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)). To show prejudice, a petitioner must show that he was actually prejudiced as a result of the alleged violation of federal law. *United States v. Frady*, 456 U.S. 152, 167-69, 102 S. Ct. 1584, 1594-95 (1982). To establish a "fundamental miscarriage of justice," a petitioner must show "that he is actually innocent of the charges against him." *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (citing *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565).

With these principles in mind, the court will consider the respondent's arguments that Claims VIIA, VIIC, VIIE, XII, XIII, XIV and XV are procedurally defaulted.

Claims VIIA, VIIC, and VIIE

In Claims VIIA, VIIC and VIIE, Allen alleges that he received ineffective assistance of counsel by his counsel's failure to advise him of his Fifth and Fourteenth Amendment rights during interviews with state mental health professionals, by his counsel's failure to preserve for appellate review the denial of his motion to change venue and the court's failure to regulate the dress and seating arrangements of troopers attending the trial, and by his counsel's failure to preclude the state's use of rebuttal testimony at trial from a medical doctor who examined Allen on the night of his arrest without advising him of his Fifth and Fourteenth Amendment rights. The respondent contends that Allen has failed to exhaust his state remedies as to these claims because he did not raise them in his petition for *certiorari* to the North Carolina Supreme Court.

In his petition for writ of *certiorari*, Allen listed six issues under the heading "Questions Presented." App. to Resp., Tab 7. Claims VIIA, VIIC and VIIE were not included in the "Questions Presented." According to the respondent, by failing specifically to present these issues to the highest state court, Allen abandoned these claims and failed to exhaust his state court remedies.

Allen does not dispute that Claims VIIA, VIIC and VIIE were not specifically listed in the "Questions Presented" in his petition for writ of *certiorari*. He also does not dispute that, in order to satisfy the exhaustion requirement, a petitioner must present his claims to the state supreme court on a petition for discretionary review. *See* Pet.'s Mot. for Ext. of Time for Filing (filed May 11, 2000) at 2; *see also O'Sullivan*, 526 U.S. at 845, 119 S. Ct. at 1732. However, Allen argues that these claims were technically before the

North Carolina Supreme Court because they were addressed in the state court's order that was submitted to the North Carolina Supreme Court for review.

The court finds no merit to Allen's argument. In order to satisfy the exhaustion requirement, Allen must have given the North Carolina Supreme Court a fair opportunity to review his claims. *See O'Sullivan*, 526 U.S. at 848, 119 S. Ct. at 1734. Because Allen failed to ask the North Carolina Supreme Court to review Claims VIIA, VIIC and VIIE by identifying them in his "Questions Presented," Allen failed to give that court a fair opportunity to review them. The simple fact that these claims were addressed in the underlying state court order that Allen submitted to the North Carolina Supreme Court is not sufficient to establish that the North Carolina Supreme Court had a fair opportunity to review these claims. Thus, the court finds that Claims VIIA, VIIC and VIIE are not exhausted.

Because the time for raising Claims VIIA, VIIC and VIIE in the North Carolina Supreme Court has long passed, the respondent contends that these claims are procedurally defaulted. Allen does not refute that Claims VIIA, VIIC and VIIE would be procedurally barred if he now presented them to the North Carolina Supreme Court. Where it is clear that a claim "would be procedurally barred under state law if the petitioner attempted to present it to the state court," the court may treat the claim as exhausted. *Baker*, 220 F.3d at 288. The procedural bar that allows the court to treat the claim as exhausted also provides an adequate and independent state ground for procedural default. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 2080 (1996).

The court finds that Claims VIIA, VIIC and VIIE would be procedurally barred under state law if Allen now

attempted to present them to the North Carolina Supreme Court. Accordingly, the court finds that these claims are procedurally defaulted. Because Allen has failed to show cause and prejudice or that the court's refusal to consider these claims will result in a fundamental miscarriage of justice, the court is precluded from reviewing these claims. Accordingly, the respondent's motion for summary judgment as to Claims VIIA, VIIC and VIIE must be granted.

Claims XII, XIII and XIV

The respondent also contends that Claims XII, XIII and XIV, which were raised in Allen's first amended petition, are procedurally defaulted. In Claim XII, Allen alleges that the state knowingly presented false testimony concerning Allen's symptoms of drug withdrawal on the evening of his arrest. In Claim XIII, Allen alleges that the state wrongfully concealed evidence of his drug withdrawal at the suppression hearing. In Claim XIV, Allen alleges that the state withheld evidence that it manipulated a witness. According to Allen, he discovered the factual basis for these claims in 1998 when the state produced certain documents from the district attorney's files which showed, among other things, that while he was in jail, he was given a medication used to treat withdrawal symptoms.

Allen raised these claims in a second MAR. The state court found that Claims XII and XIII were procedurally barred pursuant to N.C. Gen. Stat. § 15A-l419(a)(1) and that Claim XIV was procedurally barred pursuant to N.C. Gen. Stat. § 15A-l419(a)(2). Thus, this court must determine whether the state court's application of its procedural bar constitutes an independent and adequate state ground to support a procedural default. If so, this court is precluded from reviewing these claims unless Allen establishes cause

and prejudice, or that the failure to review these claims will result in a fundamental miscarriage of justice.

Pursuant to N.C. Gen. Stat. § 15A-l419(a)(l), a claim is procedurally barred if, "[u]pon a previous motion . . . the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." A claim is procedurally barred pursuant to § 1419(a)(2) if "[t]he ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court." N.C. Gen. Stat. § 15A-l419(a)(2).

Section 15A-l419(a)(1) consistently has been found to be an adequate and independent state law ground sufficient to establish procedural default. *See Bacon v. Lee*, 225 F.3d 470, 476 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1420 (2001); *Boyd v. French*, 147 F.3d 319, 332 (4th Cir. 1998), *cert. denied*, 525 U.S. 1150, 119 S. Ct. 1050 (1999); *Williams v. French*, 146 F.3d 203, 217-18 (4th Cir. 1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061 (1999). However, § 15A-l419(a)(2), which is based on the doctrine of *res judicata*, is not a proper ground upon which to base a procedural default. *Green v. French*, 978 F. Supp. 242, 251-52 (E.D.N.C. 1997), *aff'd*, 143 F.3d 865 (4th Cir. 1998), *overruled on other grounds by*, *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). *Cf. Turner v. Williams*, 35 F.3d 872, 889-90 (4th Cir. 1994) (construing an analogous "raised and decided" rule in Virginia and holding that the Virginia court's dismissal of claims because they were raised and decided on direct appeal was "not a true procedural default rule").

The state court found that Allen was in a position to raise Claims XII and XIII in his first MAR because the facts

supporting these claims — that Allen experienced withdrawal symptoms after his arrest and that he was given Thorazine injections, a medication used to treat withdrawal symptoms — were within Allen's personal knowledge at the time he filed his first MAR. Because Allen failed to raise these claims in his first MAR, the state court found that Claims XII and XIII were procedurally barred pursuant to N.C. Gen. Stat. § 15A-l419(a)(1).

To show cause, Allen argues that his counsel did not learn of the facts supporting these claims until the state produced discovery in 1998, after his first MAR had been filed and adjudicated. However, the state court found that the factual predicate for these claims was personally known by Allen at the time he filed his first MAR. The state court's factual findings supporting the application of the procedural bar are presumed correct. *See* 28 U.S.C. § 2254(e)(1); *Williams v. French*, 146 F.3d 203, 209 (4th Cir. 1998) ("Findings of the state court supporting its decision to apply the state procedural default rule are entitled to a presumption of correctness in determining whether cause exists to excuse a procedural default."), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061 (1999). Allen has failed to refute the state court's factual finding with clear and convincing evidence. Because Allen has made no showing that something external to him prevented him from raising this claim in his first MAR, he has failed to establish cause to avoid a procedural default. Likewise, Allen has failed to make a showing of actual innocence to establish that the failure to consider the claim would result in a fundamental miscarriage of justice.

Because Allen has shown neither cause and prejudice nor that the failure to consider these claims will result in a fundamental miscarriage of justice, the court finds that Claims XII and XIII are procedurally defaulted. Accordingly,

the respondent's motion for summary judgment as to these claims must be granted.

The state court found that Claim XIV was procedurally barred pursuant to N.C. Gen. Stat. § 15A-l419(a)(2) because the North Carolina Supreme Court previously had adjudicated the ultimate issue concerning the voluntariness of Allen's confession. Because N.C. Gen. Stat. § 15A-l419(a)(2) is not an independent and adequate state ground to support a procedural default, the court will consider this claim on the merits in sequence with the remaining claims raised in the petition.

Claim XV

In Claim XV, Allen challenges the constitutionality of North Carolina's short-form murder indictment. The respondent contends that this claim is procedurally defaulted pursuant to N.C. Gen. Stat. § 15A-l419(a)(1) and (3)[4] because Allen was in a position to raise this claim on direct appeal and in his MAR but failed to do so. Allen contends, however, that he presented this claim to the North Carolina Supreme Court on an application for writ of habeas corpus, which that court denied on the merits. Because it is not apparent from the North Carolina Supreme Court's adjudication of this claim that it was invoking a procedural bar, this court finds that this claim is not procedurally defaulted. Thus, the court will consider this claim on the merits below.

C. Analysis of Allen's Claims

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[4] N.C. Gen. Stat. § 15A-l419(a)(3) procedurally bars claims that could have been, but were not, raised in a prior appeal.

Having addressed the preliminary matters, the court now will review each of Allen's remaining claims to determine whether the state court adjudicated the claim on the merits and, if so, whether the state court's adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, or was based upon an unreasonable determination of facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

1. Claim I — Must Allen's death sentence be vacated because the jury was given unconstitutional instructions concerning mitigating circumstances, in violation of *McKoy v. North Carolina*?

It is not disputed that the trial judge's jury instructions concerning the finding of mitigating circumstances were unconstitutional for the reasons explained in *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990). What Allen disputes is the North Carolina Supreme Court's determination that the *McKoy* error in this case was harmless beyond a reasonable doubt. Allen contends that the jury poll, which the North Carolina Supreme Court relied upon in determining that the *McKoy* error was harmless, was ambiguous. Because the state court refused to hear and consider evidence of such ambiguity at the MAR hearing, Allen contends that he is entitled to an evidentiary hearing on this claim.

In finding that the *McKoy* error in Allen's case was harmless beyond a reasonable doubt, the North Carolina Supreme Court reasoned as follows:

> When the verdict was returned, the trial judge announced that the jury would be polled. She

> said, "you will be asked individually as to your answers to the issues and as to the recommendation." The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still assented thereto. Each juror answered in the affirmative.
>
> It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find. No juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case. We hold this error was harmless beyond a reasonable doubt.

Allen II, 331 N.C. at 747, 417 S.E.2d at 228.

Allen argues that this reasoning is contrary to *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988), and *McKoy* because the jury poll upon which the North Carolina Supreme Court relied was ambiguous and did not constitute unequivocal extrinsic evidence that the jury was unanimous in its findings. According to Allen, variations in the way in which the polling questions were presented to the jurors make it apparent that, rather than reflecting the individual views of each juror, the poll reflects their collective verdict.

Mills reversed a capital sentence where the Court found a "substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384, 108 S. Ct. at 1870. The ambiguity in *Mills* stemmed, at least in part, from a statutory sentencing scheme that was susceptible to multiple interpretations. The Court noted the absence of "extrinsic evidence of what the jury . . . actually thought" to aid in the determination of whether the jury applied the proper interpretation to the sentencing instructions. *Id.* at 381, 108 S. Ct. at 1868. As a result, the Court vacated the death sentence and remanded for further proceedings. *Id.* at 383-84, 108 S. Ct. at 1870.

In an effort to show that the North Carolina Supreme Court's adjudication of this claim is contrary to *Mills*, Allen argues that the jury poll relied upon by the North Carolina Supreme Court in finding the *McKoy* error harmless was ambiguous and, therefore, does not constitute the type of extrinsic evidence contemplated by the Court in *Mills*. Allen relies heavily on the fact that the actual wording used by the clerk in polling the jury contained slight, but according to Allen, significant variations.[5]

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[5] For example, the first question was presented in the following forms: Are these ***the*** answers to ***your*** issues? (Jurors Boone, Knight, Glasgow, Tr. at 3391, 3394, 3399), Are these ***the*** answers to ***the*** issues? (Jurors Scott, Ruffin, Qualles, Tr. at 3397, 3402, 3405), Are these ***your*** answers to ***the*** issues? (Jurors Watson, Leonard, Thorne, Gums, Parker, Hardison, Tr. at 3408, 3411, 3413, 3416, 3419, 3422) (emphasis added).

Allen raised this claim in his MAR and sought to present evidence on the issue of ambiguity at the MAR hearing. Specifically, Allen sought to present evidence of how a "reasonable juror" would have interpreted the polling questions and how one juror actually interpreted the questions. Allen tendered affidavits from three experts in the field of linguistics and psychology and an affidavit from a juror. However, the state court struck the affidavits and refused to hear extrinsic evidence concerning what the jurors might have understood the polling questions to mean.

Allen has not met his burden of showing that the North Carolina Supreme Court's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law. It was not contrary to clearly established federal law for the North Carolina Supreme Court to apply a harmless error analysis to its review of the *McKoy* error. *Cf. Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990) (finding that the Mississippi Supreme Court could apply a harmless error analysis when reviewing a death sentence imposed after the jury was instructed concerning a constitutionally invalid aggravating circumstance). Moreover, the North Carolina Supreme Court's reliance upon and analysis of the jury poll to support its finding of harmlessness was neither contrary to nor an unreasonable application of *Mills* or *McKoy*. Allen's criticisms of the poll disregard the context in which the poll was taken. The jury had previously been polled at the conclusion of the guilt/innocence phase. In her preliminary explanatory remarks to the jury before the poll, the trial judge explained that "[t]his is the same procedure that we used on Monday. You will be asked individually as to your answers to the issues and as to the recommendation." Tr. at 3389. Moreover, when polling each juror, the clerk read the entire verdict form including each of the mitigating circumstances

submitted and the jury's findings thereto, and then questioned each juror as to his or her assent to the answers given. *See* Tr. at 3391, 3394, 3397, 3399-3400, 3402, 3405, 3408, 3410-11, 3413, 3416, 3419, 3422.

Thus, the court cannot find that the North Carolina Supreme Court, relying upon the jury poll, adjudicated this claim in a manner that was contrary to or an unreasonable application of clearly established federal law. The court finds no merit to Allen's contention that he is entitled to an evidentiary hearing to establish that the jury poll was ambiguous or that jury misunderstood the polling questions. *See Keller v. Petsock*, 853 F.2d 1122 (3rd Cir. 1988) (claim that the jury misunderstood polling procedures does not merit further factual development because it conflicts with the rule against considering "intra-jury influences on the verdict"). Because Allen has not shown that he is entitled to relief on this claim, the respondent's motion for summary judgment as to Claim I must be granted.

2. Claim II — Did the exclusion of Allen and his counsel from an *ex parte* examination of jurors and the failure to disclose the content of that examination violate Allen's rights to presence, effective assistance of counsel, to trial by a fair and impartial jury, and to due process of law?

Allen's second claim arises from an *ex parte* examination of jurors conducted in chambers by the trial judge after a weekend recess during which a news report about the trial was televised. In this news report, it was reported that Trooper Worley's widow did not care or did not want the death penalty imposed. In an effort to ascertain whether the jury was tainted by this news report, the trial

judge examined each of the jurors and alternates in chambers with only a court reporter present.

The *ex parte* examination of Juror Gums, which is the subject of Claim II, was as follows:

COURT: In particular, concerning television accounts, did you see any?

MS. GUMS: No. We don't cut the TV on until after the news is off. Bob tears the section of the paper out that I'm not supposed to see and balls it up and throws it away. He was in a car accident, and I had to go pick him up, but he informed the highway patrolmen not to speak to me, that I was a juror. He said don't speak to her, she's a juror, and they said okay.

* * *

MS. GUMS: . . . and, as soon as I got there, he said don't speak to my wife, she's a juror, and they thanked him.

MS. GUMS: . . . He was climbing up the embankment, and he told the highway patrolmen, don't speak to her, she's on jury duty. So, we have been overly cautious.

Tr. at 1541-43. Allen contends that the substance of this examination, and specifically the fact that Juror Gums had contact with a highway patrolman during the recess, was not disclosed to him during trial. As a result, Allen claims that his rights to presence, effective assistance of counsel, trial by a fair and impartial jury and due process were violated because he was denied the opportunity to examine Juror Gums to determine for himself whether her contact with the highway patrolman had any impact on her ability to serve impartially as a juror.

Allen raised this claim on direct appeal. The North Carolina Supreme Court found that any error committed by the trial judge was harmless beyond a reasonable doubt:

> Following the examination of each of the jurors the court reported to the parties what was said. A transcript of the proceedings was made available to the parties. One of the alternate jurors told the judge that her husband had been in an automobile accident and she had driven to the scene to pick him up. She said her husband told the highway patrolman at the accident scene not to talk to her because she was on the jury. She said she was very cautious at the scene of the accident not to talk to the patrolman.
>
> . . . The defendant has not shown us and we can think of no facts which would shed additional light on the question of the influence of the patrolman on the juror. It is clear that the juror had no real contact with the patrolman.

Allen I, 323 N.C. at 222-23, 372 S.E.2d at 863-64.

Allen also raised this claim in his MAR and asserted that the North Carolina Supreme Court's adjudication of the claim was based upon a mistake of fact. According to Allen, the North Carolina Supreme Court based its decision upon the mistaken belief that counsel was provided a transcript of the trial judge's *ex parte* examination of jurors during the trial. Although the state court found that this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2), Allen was allowed to present evidence at the evidentiary hearing that the transcript of the *ex parte* examination was not prepared and given to the parties until after the trial.

Allen argues that the North Carolina Supreme Court's adjudication of this claim was both contrary to and an unreasonable application of *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954). Allen also contends that the North Carolina Supreme Court "wrongly assumed that trial counsel were given a transcript of the juror's *ex parte voir dire* during the trial." Pet.'s Supplemental Mem. in Supp. of Pet. for Writ of Habeas Corpus at 12.

In *Remmer*, the Supreme Court held that

> any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive,

> but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229, 74 S. Ct. at 451. To establish a claim of improper *ex parte* juror contact, the party attacking the verdict "must introduce competent evidence that there was an extrajudicial communication or contact, and that it was 'more than innocuous interventions.'" *Howard v. Moore*, 131 F.3d 399, 422 (4th Cir. 1997) (quoting *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996)), *cert. denied*, 525 U.S. 843, 119 S. Ct. 108 (1998). If this threshold requirement is satisfied, a presumption of prejudice arises. *Id.*

Although the North Carolina Supreme Court did not cite *Remmer* in its opinion, its adjudication of this claim is not contrary to *Remmer*'s holding. The North Carolina Supreme Court found that the juror had "no real contact with the patrolman." *Allen I*, 323 N.C. at 222, 372 S.E.2d at 863. This factual finding is presumed correct, and Allen has not rebutted this presumption. Allen has not shown that an "extrajudicial communication or contact" occurred that could serve as the basis for a claim of improper *ex parte* juror contact under *Remmer*. *See Howard*, 131 F.3d at 422.

Furthermore, Allen's argument that the North Carolina Supreme Court relied upon the mistaken belief that a transcript of the *ex parte* examination of Juror Gums had been made available to the parties during the trial is not supported by the record. The statement that "[a] transcript of the proceedings was made available to the parties," *Allen I*, 323 N.C. at 222, 372 S.E.2d at 863, is accurate. This statement carries no temporal implications. Neither the

court's statement nor the context in which it was made suggests that the North Carolina Supreme Court based its decision upon an implicit assumption that a transcript was made available to the parties during the trial. Because Allen has failed to demonstrate that the North Carolina Supreme Court's adjudication of this claim was either contrary to or an unreasonable application of clearly established federal law, Allen is not entitled to relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim II must be granted.

3. Claim III — Was Allen improperly denied discovery in state post-conviction proceedings, thereby depriving him of a full and fair hearing on a number of his claims?

After the petition was filed, Allen continued to litigate his claims relating to discovery in state court and ultimately prevailed. In his supplemental memorandum filed June 13, 2000, Allen made no further argument concerning this claim. Although Allen has not withdrawn this claim, it appears to the court that all issues relating to this claim have been resolved in state court proceedings and that this claim is now moot. However, to the extent that Allen continues to allege that he was improperly denied discovery in state court proceedings, the court finds that Allen has failed to show the deprivation of a constitutional right so as to be entitled to the writ. Accordingly, the respondent's motion for summary judgment as to Claim III must be granted.

4. Claim IV — Were Allen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution violated by the trial court's admission of an illegally obtained statement?

In Claim IV, Allen contends that his confession was illegally obtained when, after he requested an attorney, the interrogating officers disregarded his request and continued to encourage him to make a statement. Allen raised this claim on direct appeal and it was adjudicated on the merits by the North Carolina Supreme Court. Allen contends that the state court's adjudication of this claim is contrary to *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981).

What occurred during Allen's interrogation is not in dispute. At approximately 1:50 p.m. on May 14, 1985, two officers began interrogating Allen. Allen was read the *Miranda* warnings and he signed a written waiver of rights. Allen was not responsive to the officers' initial attempts to interrogate him. However, after being told that Antonio Worrell had made a statement that Allen had shot Trooper Worley, Allen said "'something to the effect that if he made a statement that they would put him in the gas chamber — or the electric chair.'" *Allen I*, 323 N.C. at 216, 372 S.E.2d at 860. Allen then stated that he wanted to talk to a lawyer. The officers stopped their questioning, but one of the officers then told Allen that all he wanted was the truth, that Allen would be returned to his jail cell and that there would be no further interview with him. Allen also was told that if he wished to have further conversation, he should ask to speak to an officer, and it was specifically suggested that he ask for one of the two officers who had been questioning him. After this was said, Allen said "okay" and then "I want to talk to you now, man." *Id.* The officers then took a statement from Allen in which he confessed to shooting Trooper Worley.

Allen's counsel moved to suppress his confession. After hearing evidence, the trial judge found that Allen had initiated further contact with the officers after he had requested counsel and that he had knowingly, voluntarily and

intelligently waived his right to silence and right to counsel. Thus, the trial judge found that Allen's confession was admissible. Based upon the trial judge's ruling, Allen's confession was read into evidence at trial.

Once an accused invokes his right to counsel, he is not "subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1885. This rule, described as a "'second layer of prophylaxis for the *Miranda* right to counsel,'" is intended to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights. *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 2355 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S. Ct. 2204 (1991)). The Supreme Court defined what constitutes "interrogation" in *Rhode Island v. Innis*:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90 (1980).

The North Carolina Supreme Court specifically found that Allen's confession was not obtained in violation of *Edwards*:

> After [Allen] requested counsel the officers did not ask any further questions of the defendant. They told him of their availability if he changed his mind. We can find no coercion or pressure, nor was there any "functional equivalent" to questioning. . . . The fact that the defendant was to be handcuffed to be returned to his jail cell is not a continuation of the interrogation. We believe the facts found by the superior court support the conclusion that the defendant of his own volition initiated the continuation of the interrogation.

Allen I, 323 N.C. at 217, 372 S.E.2d at 860 (citing *Rhode Island v. Innis*, 446 U.S. at 291, 100 S. Ct. at 1682). The state court further found that Allen's waiver of his constitutional rights was the product of a free and deliberate choice "with a full awareness both of the nature of the rights being abandoned and the consequences of the decision to abandon them." *Id.* at 218, 372 S.E.2d at 861.

Allen challenges the North Carolina Supreme Court's finding that the interrogation was reinitiated because, in his view, the interrogation never ceased. He contends that, because the officers did not leave the room after he requested counsel, did not obtain a second written waiver of rights before taking his confession, and continued their conversation with Allen after he requested counsel, there was but one "single and continuous interrogation" in which his request for counsel was never honored. However, the fact

that the officers never left the room after Allen invoked his right to counsel is not dispositive. The North Carolina Supreme Court clearly found that, after Allen invoked his right to counsel, "the officers did not ask any further questions" and there was "no coercion or pressure, nor . . . any 'functional equivalent' to questioning." *Id.* at 217, 372 S.E.2d at 860. Thus, that court concluded that Allen had reinitiated his interrogation.

Allen has failed to rebut the correctness of the state court's factual findings by clear and convincing evidence. Based upon those findings, this court cannot find that the North Carolina Supreme Court's adjudication of this claim was contrary to or involved an unreasonable application of clearly established federal law. Therefore, the court finds that Allen is not entitled to any relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim IV must be granted.

5. Claim V — Was Allen's right to be tried by a jury selected without regard to race violated by the state's discriminatory use of peremptory challenges against potential jurors of African-American descent?

Allen contends that the prosecutor used his peremptory challenges in a racially discriminatory manner to exclude African-Americans from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). To support this claim, Allen relies upon the fact that the prosecutor used 11 of 13 peremptory strikes to remove 11 of 18 qualified blacks from the jury, whereas he used only 2 peremptory strikes to remove whites.

Allen raised this claim on direct appeal and it was adjudicated on the merits by the North Carolina Supreme Court. Allen also raised this claim in his MAR and sought to introduce evidence relating to this claim at the MAR hearing. However, the state court found this claim procedurally barred pursuant to N.C. Gen. Stat. § 15A-l915(a)(2) and refused to hear additional evidence.

A prosecutor's use of peremptory challenges to exclude from the jury members of the defendant's race gives rise to a claim of racial discrimination in violation of the Fourteenth Amendment. *Id.* at 96-97, 106 S. Ct. at 1723. To establish a prima facie case of racial discrimination, a defendant must show

> first . . . that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 106 S. Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). Once a defendant makes this showing, "the burden shifts to the State to come forward with

a neutral explanation for challenging black jurors." *Id.* at 97, 106 S. Ct. at 1723.

The Court in *Batson* provided guidance for determining whether a defendant made a prima facie case of racial discrimination:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Id. at 97, 106 S. Ct. at 1723.

In finding that Allen failed to establish a prima facie case of racial discrimination, the North Carolina Supreme Court relied upon the fact that "the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black." *Allen I*, 323 N.C. at 219, 372 S.E.2d at 862. Allen contends that the North Carolina Supreme Court's adjudication of this claim is contrary to *Batson* because it "focus[ed] solely on the State's

acceptance of seven (ultimately six) black jurors (in a majority black county)." Pet.'s Supplemental Mem. in Supp. of Pet. for Writ of Habeas Corpus at 17. Allen relies upon *Powers v. Ohio*, 499 U.S. 400 (1991) to support his claim that the numerical showing established in this case — that the state used 11 of its 18 peremptory challenges against blacks while it used only 2 peremptory challenges against whites — is sufficient to establish a prima facie case of racial discrimination. Allen also relies upon the fact that the North Carolina Supreme Court, in *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991), subsequently found a prima facie case of racial discrimination where there was a high acceptance rate of blacks and held that a high acceptance rate, although relevant, is not the determining factor in deciding whether a prima facie case of racial discrimination is established.

The authorities relied upon by Allen, decided three years *after* the North Carolina Supreme Court adjudicated this claim, provide no support for his claim. The question before this court is whether the North Carolina Supreme Court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law existing in 1988, when that court adjudicated this claim. *See T. Williams*, 529 U.S. at 412, 120 S. Ct. at 1523.

Examining this claim based upon the clearly established federal law existing in 1988, this court finds that the North Carolina Supreme Court's adjudication of this claim is neither contrary to nor an unreasonable application of *Batson*. *Batson* did not establish a mathematical formula to be applied but rather instructed that trial courts were to consider "all relevant circumstances" surrounding the jury selection process. *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Allen has failed to establish that the North Carolina Supreme

Court's adjudication of this claim was contrary to, or involved an unreasonable application of, *Batson*.

For these reasons, the court finds that Allen has failed to show that he is entitled to relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim V must be granted.

6. Claim VI — Must Allen's death sentence be vacated because of the prosecutor's arguments, both at the guilt/innocence phase of trial as well as at the sentencing phase?

Allen contends that the prosecutor made grossly improper arguments at both the guilt/innocence phase of the trial and the sentencing phase. According to Allen, the challenged arguments were calculated to inflame and to invite the jury to deliberate on the basis of irrelevant factors. Allen raised this claim on direct appeal. The North Carolina Supreme Court found no error.

a. Arguments at the Guilt/Innocence Phase

During closing argument at the guilt/innocence phase, in an apparent effort to explain Allen's confession, counsel argued that Allen's confession came only after his request for counsel was ignored. The prosecutor then argued are follows:

> There's been a lot of talk in this case, particularly the initial arguments about you all doing what's right and doing your duty. . . . Justice is the last thing that Timothy Allen wants from you. Timothy Allen will hide

> behind your concepts of justice. He will hide behind the Constitution of this country that protects all of us. Not just selected ones of us, but all of us. But it's not something for a criminal to hide behind.
>
> The Constitution of this land has been complied with. The judge has ruled on the admissibility of the confession, and it has come before you. The only thing left for you to decide right now is was it true.

Tr. at 2931.

Allen contends that these arguments, and specifically the references to his constitutional rights, run afoul of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240 (1976), and *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229 (1965). In *Doyle*, the Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings violated due process. 426 U.S. at 619, 96 S. Ct. at 2245. In *Griffin*, the Court held that the Fifth Amendment forbids a prosecutor to comment on a defendant's failure to testify. 380 U.S. at 615, 85 S. Ct. at 1233.

Because counsel did not object to these arguments at trial, Allen argued on direct appeal that the trial judge erred in failing to intervene *ex mero motu*. The North Carolina Supreme Court found no error:

> *Doyle* and *Griffin* deal with a specific constitutional right which would be infringed if comments are made about it. A general comment about constitutional rights as was

> made in this case does not rise to the same level. It is certainly not such a gross impropriety that the court should have intervened *ex mero motu*.

Allen I, 323 N.C. at 227, 372 S.E.2d at 866. This reasoning is neither contrary to nor an unreasonable application of *Doyle* and *Griffin*.

As for the prosecutor's argument relating to the admissibility of Allen's confession, the North Carolina Supreme Court again found no error: "When the defendant challenged the confession the judge had to rule on its admissibility. When she ruled it was admissible the jury then had to pass on its truthfulness. This is what the assistant district attorney told the jury . . . ." *Id.* Allen has failed to establish that this adjudication was contrary to or an unreasonable application of clearly established federal law.

Allen also claims that the trial judge erred in failing to intervene *ex mero motu* when the prosecutor made the following argument concerning Allen's request for counsel:

> [The defendant] was looking out for himself, the same as he had been when he went in there and said, "Well, I think maybe I need a lawyer." That was a feeler. That was, that was for number one, you put it out there and see how [the officers] react. Are they going to deal with me on this?

Tr. at 2935. In reviewing this claim, the North Carolina Supreme Court found that "[t]he manner in which the defendant delayed his request for an attorney could give rise

to the inference for which the State argued" and, therefore, found no error. *Allen I*, 323 N.C. at 227, 372 S.E.2d at 866.

The prosecutor's remarks here are unlike the remarks made in *Doyle* and *Griffin* and did not involve Allen's exercise of his right to silence or his right to be free from self-incrimination. The prosecutor's arguments here were in rebuttal to Allen's own argument that law enforcement failed to honor his request for counsel. There is no absolute ban against any mention of a defendant's exercise of his right to counsel. *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634 (1986). Moreover, the prosecutor's arguments in this case did not go to the substantive issue of guilt or innocence but, rather, attacked Allen's credibility as a witness by probing his motivation for his request for counsel. *See Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 1125 (2000) (a defendant who takes the stand "may be impeached and his testimony assailed like that of any other witness") (internal quotation omitted).

b. Arguments at the Sentencing Phase

During closing argument at the sentencing phase, the prosecutor focused on the role of law enforcement officers in society. The prosecutor encouraged the jurors to "consider the bravery of law enforcement officers who captured defendant before he could go into the jurors homes", Tr. at 3305-06, argued that law enforcement officers deserved the protection of the death penalty for the same reason that "it ought to be an aggravating circumstance for a juror to be killed", Tr. at 3335-36, told the jury that "this case is being looked at" to see whether the jury appreciated law enforcement, Tr. at 3342, and warned the jury that, unless they did their duty by recommending death, they would be telling law enforcement officers that their lives and services

were of no value. Tr. at 3347-48. At one point, the prosecutor also had a uniformed state trooper stand in front of the jury box while he discussed the public service of law enforcement officers. Tr. at 3341-42. Allen's counsel objected to most of these arguments.

For the challenged arguments to constitute constitutional error, they must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974). The North Carolina Supreme Court reviewed the arguments challenged by Allen and found that they focused the jurors' attention on one of the aggravating factors — that the person killed was a law enforcement officer in the performance of his official duty. *See* N.C. Gen. Stat. § 15A-2000(e)(8) (1983). The North Carolina Supreme Court specifically found that the prosecutor's arguments were not "appeal[s] to the jury to impose the death penalty because that is what is desired by the public." *Allen I*, 323 N.C. 229, 372 S.E.2d at 867.

Allen has failed to show that the prosecutor's arguments, taken in context and as a whole, so infected the trial with unfairness so as to deny him of due process. Moreover, he has failed to establish that the North Carolina Supreme Court's adjudication of this claim was contrary to or involved an unreasonable application of clearly established federal law.

For these reasons, the court finds that the North Carolina Supreme Court's adjudication of Allen's claims arising from the prosecutor's closing arguments was neither contrary to nor an unreasonable application of clearly established federal law. Therefore, Allen is not entitled to

relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim VI must be granted.

7. Ineffective Assistance of Counsel

Allen raised six grounds in support of his claim of ineffective assistance of counsel. The court previously adjudicated Claims VIIA, VIIC and VIIE on the grounds of procedural default. Claims VIIB, VIID and VIIF remain before the court. In Claim VIIB, Allen alleges that his counsel were ineffective in failing to challenge properly the admissibility of his confession. In Claim VIID, Allen alleges that his counsel were ineffective at the guilt/innocence phase of his trial in failing to present evidence of his voluntary intoxication and diminished capacity. In Claim VIIF, Allen alleges that his counsel were ineffective at the sentencing phase in failing to investigate and present mitigating evidence. Each of these claims was raised in Allen's MAR and denied on the merits by the state court. Therefore, Allen must demonstrate that the state court's adjudication of these claims was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

In *Strickland v. Washington*, the Supreme Court set forth a two-part test for determining whether counsel's performance was constitutionally adequate and effective: (1) did counsel's representation fall below an objective standard of reasonableness? If so, (2) did counsel's deficient performance result in prejudice to the defense? *Strickland*, 466 U.S. 668, 687-88, 692-93, 104 S. Ct. 2052, 2064, 2067 (1984). The reasonableness of counsel's performance must be judged on the specific facts of the case, viewed as of the

time of counsel's conduct. *Id.* at 690, 104 S. Ct. at 2066. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S. Ct. at 2065. To establish prejudice, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

In reviewing counsel's performance, this court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S. Ct. at 2066. Moreover, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S. Ct. at 2065; *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998). Attorney errors must be judged in their context. As the Supreme Court explained in *Strickland*:

> Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

Strickland, 466 U.S. at 693, 104 S. Ct. 2067.

a. Claim VIIB: Did Allen's trial counsel render ineffective assistance in their handling of the motion to suppress his confession?

Allen contends that he received ineffective assistance of counsel because his counsel failed to present expert

testimony at the suppression hearing to support his claim that he was intoxicated from large quantities of drugs and alcohol; he was experiencing the onset of heroin withdrawal; and, he was not capable of making a knowing, intelligent and voluntary waiver of his rights at the time he waived his rights. Allen argues that, had such expert testimony been presented, there is a reasonable likelihood that the outcome of the trial would have been different.

Allen's counsel were granted funds on May 31, 1985, to hire an independent medical and psychiatric expert to examine Allen. However, Allen was not examined by the expert retained by counsel until September 20, 1985, approximately two weeks after the hearing on the motion to suppress. At the suppression hearing, Allen testified that he had ingested a large quantity and variety of drugs and alcohol prior to the offense and his interrogation. Allen's counsel presented no expert testimony to support Allen's testimony. To rebut Allen's testimony, the state relied upon the report of Dr. Brown, who had examined Allen at the jail a few hours after his interrogation. The purpose of Dr. Brown's examination was "to determine if there were any health problems with him, whether he was oriented, and whether there were any withdrawal problems." Memorandum Opinion and Final Order dated Aug. 23, 1996 (hereinafter "MAR Order") at 6. In his report, Dr. Brown noted that Allen was oriented as to time, place and person and that Allen had indicated that, although he had used drugs, he had not used any drugs in the previous 12-24-hour period. *Id.*

In adjudicating this claim, the state court found that Allen failed to establish either prong of *Strickland*. The state court found, among other things, that counsel's investigation on the issue of Allen's capacity to waive his *Miranda* rights was reasonable in light of the information that Allen relayed

to counsel and the information contained in Dr. Brown's report and that counsel made a tactical decision not to present expert testimony on the issue of drug use at the suppression hearing. *Id.* at 41-42. Moreover, the state court found that Allen could show no prejudice from counsel's actions. *Id.* at 43. Dr. Rose, who was hired by Allen's counsel to perform a psychiatric evaluation of Allen, stated in his report that the level of intoxication at the time of the shooting "was not sufficiently high to conclude that Allen was severely impaired and could not form a specific intent." *Id.* at 16.

At the MAR hearing, Allen submitted the testimony of Dr. Zarcone as an expert in the treatment of heroin addiction. Dr. Zarcone testified that, in his opinion, at the time of his interrogation Allen was intimidated and unable to voluntarily and intelligently waive his rights. However, the state court found that Dr. Zarcone's "opinions lack credibility and weight." *Id.* at 33.

The state court's factual findings are supported by the evidence presented at the MAR hearing. Allen has not rebutted these findings by clear and convincing evidence. Moreover, Allen has not shown that the state court's adjudication of this claim, and specifically its conclusion that Allen had failed to establish either prong of *Strickland*, was contrary to or an unreasonable application of clearly established federal law. Accordingly, the respondent's motion for summary judgment as to Claim VIIB must be granted.

b. Did Allen receive ineffective assistance of counsel because his counsel failed to submit evidence of voluntary intoxication and diminished

capacity to negate his ability to premeditate and deliberate?

In Claim VIID, Allen contends that he was so highly intoxicated at the time of the shooting that he could not premeditate and deliberate and, therefore, was not guilty of first degree murder. He argues that his counsel's failure to develop this evidence in support of a lesser charge constitutes ineffective assistance of counsel.

The state court found that trial counsel made a constitutionally adequate investigation of the facts relating to the issue of guilt/innocence. In making this finding, the state court relied upon the fact that Allen was willing to testify, and in fact did testify, that he did not shoot Trooper Worley and that evidence of voluntary intoxication and diminished capacity would have been inconsistent with, and thereby would have undermined, Allen's trial testimony. *Id.* at 44. The state court also relied upon the fact that Dr. Rose, Allen's own expert, had opined that, although Allen had consumed alcohol and drugs prior to the shooting, "'the level of intoxication does not seem sufficiently high to conclude that Allen was severely impaired and could not have formed a specific intent.'" *Id.* at 45. Finally, the state court found that counsel had "decided that a Halifax County jury would view drug use as a negative factor." *Id.* Based upon these findings, the correctness of which is presumed, the state court found that Allen failed to meet his burden under *Strickland*.

Allen has not refuted the state court's findings by clear and convincing evidence. The supplemental evidence relied upon by Allen — that Dr. Brown altered his reference to Allen's withdrawal history in various drafts of his report and that Allen was administered Thorazine while he was held in the Halifax County jail — neither refutes the state court's

factual findings nor supports his claim that the state court unreasonably applied *Strickland*. Therefore, because Allen has not met his burden of showing that the state court's adjudication of this claim was contrary to or an unreasonable application of clearly established federal law, the respondent's motion for summary judgment as to Claim VIID must be granted.

c. Did Allen's trial counsel provide ineffective assistance when they failed to investigate and present available mitigating evidence?

In Claim VIIF, Allen contends that his counsel were ineffective in failing to investigate and present to the jury mitigating evidence concerning his childhood and upbringing. He contends that, had counsel presented such evidence, there is a reasonable likelihood that the jury would not have recommended a sentence of death.

At the sentencing hearing, Allen's counsel presented the testimony of Allen, Allen's mother, one of Allen's ex-wives, and Allen's then-current girlfriend. MAR Order at 17. At the MAR hearing, Allen presented the testimony of Chiquita Brooks, his sister, Peggy Dorsey, another ex-wife, and Alex Allen, his brother. Allen also presented the testimony of Gerda Stein, a mitigation expert who testified about the possible issues in mitigation that could have been raised with regard to Allen.

The state court found that Ms. Brooks' testimony at the MAR hearing was "directly antagonistic" to the testimony of Allen's mother presented at the sentencing hearing. *Id.* Moreover, based upon the conflict between Allen's mother's testimony and the testimony of Ms. Brooks, the state court

concluded that "there is no reasonable probability that, had Ms. Brooks testified at Allen's sentencing hearing, the jury would have reached a different decision." *Id.* at 58. With regard to the testimony of Alex Allen, the state court found that he "was not credible and that no prejudice could have resulted from his not being called as a witness for Allen at trial." *Id.* at 58A. As for the testimony of Gerda Stein, the state court found that her testimony was neither relevant nor helpful. *Id.* at 36. Thus, based upon the evidence presented at the MAR hearing, the state court found that Allen could not establish any prejudice as a result of counsel's failure to present additional evidence in mitigation at trial. *Id.* at 58-59.

Allen has failed to rebut the presumption of correctness that this court must afford the state court's factual findings on this issue. Moreover, Allen has failed to establish that the state court's adjudication of this claim was contrary to or an unreasonable application of clearly established federal law. Therefore, Allen has not shown that he is entitled to relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim VIIF must be granted.

8. Claim VIII — Was Allen denied his rights to counsel and to effective representation by lead counsel's conflict of interest arising from his grossly unethical conduct?

In his eighth claim, Allen contends that his right to counsel was violated because of a conflict of interest arising from lead counsel's unethical conduct. Allen raised this claim in his MAR and the state court denied the claim on the merits.

Steven Graham was appointed on May 15, 1985, as lead counsel to represent Allen. On May 16, 1985, Allen confessed to Mr. Graham that he shot Trooper Worley. Subsequently, Allen abandoned this position and insisted that he was innocent. Mr. Graham testified at the MAR hearing that he never discussed with Allen why he abandoned his confession. Gilbert Chichester, who was appointed some time later as co-counsel to represent Allen, was not aware that Allen had confessed to Mr. Graham that he shot Trooper Worley. Allen testified at the suppression hearing and at trial that he did not shoot Trooper Worley.

Allen contends that Mr. Graham did more than violate the ethical proscription against assisting a client in the presentation of perjured testimony. Allen argues that, because Mr. Graham concealed from co-counsel the fact that Allen had confessed to him, counsel were not prepared to submit any theory of defense at trial other than innocence. Mr. Chichester testified at the MAR hearing that, had he known that Allen had confessed to Mr. Graham, he would have changed his defense strategies. Thus, Allen contends that counsel's unethical conduct rendered counsel's assistance ineffective.

The state court found that Allen had failed to show that the alleged ethical violation rendered counsel's assistance ineffective. Because Allen had given Mr. Graham conflicting stories about what happened, the state court found that Mr. Graham's failure to advise Allen about the giving of perjured testimony was reasonable. MAR Order at 63. The state court further found that Mr. Chichester's ignorance of Allen's confession to Mr. Graham did not render Mr. Chichester's decision to present an innocence defense objectively unreasonable. In so finding, the state court relied upon the fact that Mr. Chichester was aware that Allen had

made at least two other confessions, one to law enforcement officers and one to a mental health worker at Dorothea Dix, but had consistently denied his involvement in the shooting to him. *Id.* at 64.

The state court also found that Allen was unable to show any prejudice as a result of counsel's unethical conduct. Mr. Chichester was aware that Allen had confessed to the murder on two occasions. Mr. Chichester also testified at the MAR hearing that, based upon the findings of the independent mental health expert hired to examine Allen and his own personal observations, he did not believe there was enough evidence to support a diminished capacity defense. *See id.* at 65. Thus, Allen failed to establish that, but for counsel's unethical conduct, the result of the proceeding would have been different.

Based upon the state court's findings, this court cannot conclude that the state court's adjudication of this claim was contrary to or involved an unreasonable application of clearly established federal law. Because Allen has failed to show that he is entitled to relief on this claim, the respondent's motion for summary judgment as to Claim VIII must be granted.

9. Claim IX — Must Allen's death sentence be vacated because a juror was removed for cause mid-trial?

Allen's ninth claim is based upon the trial judge's dismissal of a juror for cause during the trial. Allen contends that the record did not clearly demonstrate that this juror was disqualified to serve on the jury and that, therefore, the trial judge erred in dismissing this juror. Allen raised this claim

on direct appeal. The North Carolina Supreme Court found no error.

As discussed above, the trial judge conducted an *ex parte* examination of jurors following a weekend recess during which a news report about the trial was broadcast. During this *ex parte* interview, the trial judge learned that one of the jurors had worked over the weekend and had overheard her coworkers discussing the case. Specifically, two coworkers discussed the case in the juror's presence for approximately ten to fifteen minutes before the juror eventually left the room. Prior to the weekend recess, the trial judge had instructed the juror not to discuss the case or to let the case be discussed in her presence.

Following the *ex parte* examination, the trial judge examined the juror in the presence of counsel and heard argument from counsel as to whether the juror had disregarded the court's instructions. The trial judge concluded that the juror had disobeyed her instructions and, as a result, was not qualified to serve as a juror. The trial judge then dismissed the juror and replaced her with the first alternate.

The North Carolina Supreme Court found that it was not an abuse of discretion for the trial judge to dismiss a juror who had heard other people discuss the case. *Allen I*, 323 N.C. at 224, 372 S.E.2d at 864. Although Allen contests this finding and contends that the removal of the juror was an abuse of discretion, Allen fails to allege how the North Carolina Supreme Court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law. In the absence of such a showing, Allen is not entitled to any relief on this claim. Accordingly,

the respondent's motion for summary judgment as to Claim IX must be granted.

10. Claim X — Did the trial court's refusal to submit a statutory mitigating circumstance supported by the evidence violate Allen's rights under the Eighth and Fourteenth Amendments?

In Claim X, Allen contends that the trial judge erred in failing to submit, *sua sponte*, the statutory mitigating circumstance set forth in N.C. Gen. Stat. § 15A-2000(f)(6), that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Allen raised this claim on direct appeal. The North Carolina Supreme Court found no error. *See Allen I*, 323 N.C. at 230, 372 S.E.2d at 868.

The Eighth Amendment requires that a jury's discretion in a capital sentencing proceeding be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." *Buchanan v. Angelone*, 103 F.3d 344, 347 (4th Cir. 1996) (quoting *Profitt v. Florida*, 428 U.S. 242, 258 (1976)), *aff'd*, 522 U.S. 269, 118 S. Ct. 757 (1998); *see Walton v. Arizona*, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057 (1990). A capital sentencing jury "must be allowed, in all but the rarest kind of capital cases, to consider as a mitigating factor 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Briley v. Bass*, 750 F.2d 1238, 1242 (4th Cir. 1984) (quoting *Lockett*, 438 U.S. at 604); *see also Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-71 (1986). The jury may not be precluded from considering, and may not refuse to consider, any

constitutionally relevant mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S. Ct. 757, 761 (1998). However, states are not required under the Eighth Amendment to adopt specific standards for instructing capital sentencing juries on aggravating and mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983).

The North Carolina Supreme Court, on direct review of this claim, reviewed the evidence presented and found that "[t]he fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer is not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct." *Allen I*, 372 N.C. at 230, 372 S.E.2d at 868. The court also noted that there was no expert testimony of diminished capacity. Based upon these findings, the court found that it was not error for the trial judge not to submit this mitigating circumstance to the jury.

Allen has failed to establish that the North Carolina Supreme Court's adjudication of this claim was contrary to or involved an unreasonable application of clearly established federal law. Allen has not shown that the jury was prevented from considering as mitigating evidence any aspect of Allen's character, or any of the circumstances of the offense, including his intoxicated state and drug use. Accordingly, the respondent's motion for summary judgment as to Claim X must be granted.

11. Claim XI — Did the state's submission of two duplicative aggravating circumstances violate Allen's rights under the Eighth and Fourteenth Amendments?

In his eleventh claim, Allen contends that his rights under the Eighth and Fourteenth Amendments were violated by the submission of the aggravating circumstances that the murder was committed against a law enforcement officer in the performance of his duties and that the murder was committed to avoid arrest. Allen contends that the these two factors were based upon the same factual predicate and the same conduct and, therefore, were applied in a duplicative manner that skewed the critical weighing of aggravating factors in favor of a death sentence.

Allen raised this claim on direct appeal. The North Carolina Supreme Court, relying upon its decision in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), found no error. *Allen I*, 323 N.C. at 231, 372 S.E.2d at 868.

In *Hutchins*, the North Carolina Supreme Court held that it was constitutionally permissible to submit both of the aggravating factors challenged in this case because "the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished." *Hutchins*, 303 N.C. at 354, 279 S.E.2d at 808. As that court explained:

> The aggravating circumstance that the murder was committed against an officer engaged in the performance of his lawful duties involved the consideration of the factual circumstances of defendant's crime. The aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest forced the jury to weigh in the balance defendant's motivation in pursuing his course of conduct.

Id. at 355, 279 S.E.2d at 809.

Allen has failed to show that the North Carolina Supreme Court's adjudication of this claim is contrary to or involves an unreasonable application of clearly established federal law. Allen's reliance on *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130 (1992), is misplaced. In *Stringer*, the Court reiterated what it described as a "well-settled principle": "Use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." *Stringer*, 503 U.S. at 237, 112 S. Ct. at 1140. Allen does not argue that the aggravating circumstances found by the jury in this case were vague or imprecise. Neither *Stringer* nor any other clearly established federal law precludes a jury from finding and weighing both of the aggravating circumstances submitted and found in this case.

Because Allen has failed to establish that the North Carolina Supreme Court's adjudication of this claim is contrary to or involved an unreasonable application of clearly established federal law, he is not entitled to any relief on this claim. Accordingly, the respondent's motion for summary judgment as to Claim XI must be granted.

12. Claim XIV — Did the state wrongfully conceal documented evidence of its manipulation of a witness who possessed significant information and gave critical testimony concerning Allen's mental and physical condition at the time of the crime and his interrogation, thereby depriving Allen of his constitutional rights to due process and freedom from cruel and unusual punishment?

In Claim XIV, Allen alleges that the state withheld evidence that the district attorney manipulated a witness, which evidence would have undermined the credibility of this witness at trial. Specifically, Allen contends that the district attorney manipulated the testimony of Dr. Brown by having him omit from his report the history of withdrawal symptoms related to him by Allen. Allen further contends that the state wrongfully concealed this material exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Allen raised this claim in his second MAR. Although the state court found that the "ultimate issue" raised in this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2), the state court also addressed the claim on the merits and found that it lacked merit.

The suppression by the prosecution of exculpatory evidence material to the issue of guilt or punishment requested by the accused violates due process. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. This standard was expanded in *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985), where the Supreme Court held that, whether or not requested, favorable evidence is material, and constitutional error results from its suppression, if there is a reasonable probability that, had the evidence been provided, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. More recently, the Supreme Court explained that

> *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different

> verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995).

In finding no *Brady* violation and, thus, no merit to this claim, the state court relied upon its finding that the information allegedly withheld — Allen's withdrawal history — was information that was known by Allen. Thus, because the information concerning Allen's withdrawal history was available to him from his own personal knowledge, the state court found that he could not establish that the evidence was suppressed. The state court also found that Allen had failed to establish that his withdrawal history was favorable to him and that he was prejudiced by its concealment.

The state court's factual findings are presumed to be correct. Allen has failed to rebut these factual findings and, specifically, has failed to show that the evidence concerning his withdrawal history was not known by or available to him. Nor has Allen shown that the evidence was exculpatory and that he was prejudiced by the state's failure to disclose this information prior to trial. Thus, Allen has failed to establish that the state court's adjudication of this claim was contrary to or involved an unreasonable application of clearly established federal law. For this reason, Allen is not entitled to relief on this claim and the respondent's motion for summary judgment as to Claim XIV must be granted.

13. Claim XV — Was the indictment used to charge Allen with first degree murder unconstitutional so as to deprive the trial court of jurisdiction?

In Claim XV, Allen contends that the indictment in his case, which was patterned after the North Carolina short-form murder indictment, was unconstitutional because it did not allege all of the elements of first degree murder and did not allege the aggravating circumstances relied upon by the state to support the death penalty. Thus, Allen argues that the trial court lacked jurisdiction to accept the jury's verdict and to sentence him to death.

To support of this claim, Allen relies on *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). In *Jones*, the Court stated that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6, 119 S. Ct. at 1224. In *Apprendi*, the Court invalidated a state sentencing scheme which allowed the trial judge to increase the sentence beyond the statutory maximum for the offense for which the defendant was charged and convicted upon the trial judge's findings of additional facts by a preponderance of the evidence. *Apprendi*, 530 U.S. at 491-97, 120 S. Ct. at 2363-67. The Court in *Apprendi* echoed the principle stated in *Jones* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. at 2362-63. However, the Court specifically omitted from its discussion any analysis of the constitutional validity of the state court indictment upon

which Apprendi was tried and convicted. *Id.* at 477 n.3, 120 S. Ct. at 2356.

Allen's reliance on *Jones* and *Apprendi* is misplaced. At issue in *Jones* was a federal indictment. Nothing in the Court's holding in *Jones* extended its application to indictments under state law. Likewise, the Court's holding in *Apprendi* purposely omitted any reference to an indictment.

Concerning the constitutionality of North Carolina's short-form murder indictment, the North Carolina Supreme Court has repeatedly found it sufficient to allege first degree murder under theories of both premeditation and deliberation and felony murder. *See State v. Davis*, 353 N.C. 1, 539 S.E.2d 243 (2000); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 121 S. Ct. 890 (2001). In *Braxton*, the North Carolina Supreme Court found that the statutory short-form murder indictment under N.C. Gen. Stat. § 15-144 did not run afoul of the Court's holdings in *Jones* and *Apprendi*. *Braxton*, 352 N.C. at 173-75, 531 S.E.2d at 437-38.

Moreover, even if *Apprendi* applied to state court indictments, Allen's claim would fail because *Apprendi* does not apply retroactively to cases on collateral review. *See United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001), *cert. denied*, 2001 U.S. LEXIS 10543, 70 U.S.L.W. 3339 (U.S. Nov. 13, 2001). Thus, Allen is not entitled to relief on this claim as a matter of law. Therefore, the respondent's motion for summary judgment as to Claim XV of the petition must be granted.

CONCLUSION

For the reasons stated above, the court finds that Allen has failed to establish that he is in custody in violation of the Constitution or laws of the United States. Therefore, he is not entitled to the relief requested and the respondent is entitled to judgment as a matter of law. Accordingly, the respondent's motion for summary judgment is hereby GRANTED and the petition for writ of habeas corpus is DISMISSED.

ENTERED: /s/ MALCOLM J. HOWARD
United States District Judge

12-18-01
Date

APPENDIX D

Filed: June 25, 1992

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**No. 70A86**
	)	**From: Halifax**
TIMOTHY LANIER ALLEN	)	

WEBB, Justice.

In McKoy, the United States Supreme Court held that the defendant's constitutional rights were violated because, pursuant to the court's instructions, no juror could consider a mitigating circumstance in determining whether a death sentence should be imposed if such mitigating circumstance was not unanimously found by the jury. This would be so even if such a juror felt the circumstance had mitigating value. In this case, the court instructed the jury that it must be unanimous to find a mitigating circumstance. This could keep a juror, who believed a mitigating circumstance had value, from considering such a circumstance in determining whether the death penalty should be imposed. This was error pursuant to McKoy.

The State concedes there was error in the charge but contends it was harmless beyond a reasonable doubt. *State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).* We agree with the State. In this case, ten mitigating circumstances were submitted to the jury. The jury found three of the mitigating circumstances and did not find seven of them. When the verdict was returned, the trial judge announced that the jury would be polled. She said, "you will be asked individually as

to your answers to the issues and as to the recommendation." The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still assented thereto. Each juror answered in the affirmative.

It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find. No juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case. We hold this error was harmless beyond a reasonable doubt. *State v. Laws, 328 N.C. 550, 402 S.E.2d 573 (1991).*

Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Halifax County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

Justice Lake did not participate in the consideration or decision of this case.

NO. 04-147

In The

Supreme Court of the United States

MARVIN POLK, Warden, Central Prison,
Raleigh, North Carolina,

Petitioner,

v.

TIMOTHY LANIER ALLEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 8

I. NO QUESTION WORTHY OF *CERTIORARI* REVIEW HAS BEEN PRESENTED 8

II. THE COURT OF APPEALS PROPERLY APPLIED GOVERNING LEGAL STANDARDS TO RESPONDENT'S *McKOY* CLAIM 10

A. The Court of Appeals Properly Construed 28 U.S.C. § 2254(d)(1) in Finding that the State Court's Adjudication of Respondent's *McKoy* Claim was Objectively Unreasonable 10

B. The Court of Appeals Properly Applied the *Brecht* Harmless Error Standard to the Constitutional Error in this Case 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases:

Allen v. Lee,
319 F.3d 645 (4th Cir. 2003) 7

Allen v. Lee,
366 F.3d 319 (4th Cir. 2003) (*en banc*) ..... *passim*

Allen v. North Carolina,
494 U.S. 1021 (1990) 6

Beard v. Banks,
124 S.Ct. 2504 (2004) 8

Brecht v. Abrahamson,
507 U.S. 619 (1993) 9, 14, 15

Kyles v. Whitley,
514 U.S. 419 (1995) 15

McKoy v. North Carolina,
494 U.S. 433 (1990) ..... *passim*

Mills v. Maryland,
486 U.S. 367 (1988) 6, 8, 13, 14

O'Neal v. McAninch,
513 U.S. 432 (1995) 15

State v. Allen,
372 S.E.2d 855 (N.C. 1988) 6

State v. Allen,
417 S.E.2d 227 (N.C. 1992) 6, 14

State v. Laws,
381 S.E.2d 609 (N.C. 1989), *sentence vacated on other grounds by Laws v. North Carolina*,
494 U.S. 1022 (1990) 4, 6

Wiggins v. Smith,
539 U.S. 510 (2003).....11

Williams v. Taylor,
529 U.S. 362 (2000).....10, 11

Statutes:

28 U.S.C. § 2254(d)(1)..... *passim*

28 U.S.C. § 2254(e)(1) 4

N.C. Gen. Stat. § 15A-2000(b) 4

N.C. Gen. Stat. § 15A-2000(e)(4).....2

N.C. Gen. Stat. §15A-2000(e)(8).....2

Rule:

Rules of the Supreme Court of the United States, Rule 14(i).....9

NOW COMES Respondent, Timothy Lanier Allen, and asks the Court to deny the State of North Carolina's Petition for Writ of *Certiorari* seeking review of the decision of the United States Court of Appeals for the Fourth Circuit granting a writ of habeas corpus and vacating Respondent Allen's death sentence.

As explained below, the Petition for Writ of *Certiorari* should be denied because the State has not presented a question worthy of this Court's review. The State disagrees with the Court of Appeals' 2254(d)(1) and harmless error analyses of a unique, unlikely-to-be-repeated constitutional error. Nowhere in the State's Petition is there any serious suggestion that the Court of Appeals applied the wrong legal standard. Rather, the State argues simply that the Court of Appeals erred in applying settled law to unique and unusual facts. No significant federal question is involved, nor is there any conflict in the Circuit Courts. The Petition should be denied.

JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is satisfied with the State's submissions as to jurisdiction and constitutional and statutory provisions and, pursuant to Supreme Court Rule 24.2, has nothing to add.

STATEMENT OF THE CASE

Respondent Timothy Lanier Allen was convicted and sentenced to death in Halifax County, North Carolina, in 1985. The State's evidence at trial showed that, on May 14, 1985, Raymond E. Worley, an officer with the State Highway Patrol, flagged down a stolen vehicle occupied by acquaintances of Respondent, Antonio Worrell and

Mack Green. Respondent and his brother, Alex Allen, also pulled over and, during the traffic stop, Respondent shot Officer Worley three times. Officer Worley likely lost consciousness within sixty seconds and died a few minutes later. All four men were subsequently apprehended and charged with murder. Only Respondent faced the death penalty. Based on the State's evidence, the trial court submitted to the sentencing jury two aggravating circumstances, that the capital felony was committed for the purpose of avoiding lawful arrest, N.C. Gen. Stat. § 15A-2000(e)(4), and was committed against a law enforcement officer while engaged in the performance of his official duties, N.C. Gen. Stat. §15A-2000(e)(8).

Respondent, who was then thirty years old, his mother, and his girlfriend testified in mitigation. Respondent's former wife, the mother of his oldest son, also testified. These friends and family members described how, as a child, Respondent witnessed frequent arguments and physical fights between his parents. These clashes terrified Respondent. As a consequence of his parents' bitter and violent arguments, Respondent's mother sought medical treatment for her son's nervous condition.

Respondent's parents had a particularly violent fight on Respondent's third birthday. The police were called and it was this fight that led Respondent's mother to separate from his father. Respondent was raised by his mother and grandmother. After his parents' separation and up until he was twelve, Respondent saw his father only three or four times a year.

When Respondent was around twelve years old and about to enter the sixth grade, his mother moved the family to Washington, D.C., where his father lived.

Although he was able to see his father more frequently, Respondent's teenage years were difficult. Respondent failed the sixth grade and, a few years later, at the age of fourteen or fifteen, started drinking alcohol. By the age of fifteen or sixteen, Respondent was using heroin. He dropped out of school and married his pregnant girlfriend when he was seventeen. Three years later, Respondent divorced his wife but maintained an ongoing, close relationship with his son, Timothy, Jr. Respondent's first wife and Timothy, Jr., both attended the sentencing hearing. There was also evidence that Respondent had some contact with his third son, but he was unable to locate or have contact with his second son because Respondent did not know where he lived.

Witnesses described Respondent as a shy, timid person who was bullied by others and was unwilling or unable to fight back. Other evidence showed that Respondent served a total of three years in prison for property crimes when he was in his twenties. Respondent obtained a GED and, when he was not incarcerated, Respondent maintained continuous employment. Prior to the capital offense, Respondent had never been convicted of any violent crime. A few hours before the capital offense, Respondent used drugs and there was evidence that he also drank alcohol. A doctor called by the State to evaluate Respondent the day after the shooting of Officer Worley testified that Respondent reported withdrawal symptoms. The doctor prescribed withdrawal medication for Respondent. Respondent and the law enforcement officers who interrogated him testified to Respondent's remorse for his actions.

Following the presentation of evidence at the sentencing hearing, the trial court submitted ten mitigating circumstances for the jury's consideration[1]:

1) Timothy Lanier Allen has no history of use of deadly weapons.

2) Timothy Lanier Allen expressed remorse about the death of the victim.

3) Timothy Lanier Allen completed his high school equivalency education by obtaining his GED.

4) Timothy Lanier Allen has no significant history of prior criminal activity.

5) The age of Timothy Lanier Allen at the time of the murder.

6) Timothy Lanier Allen was reared in a single parent home.

7) Timothy Lanier Allen is the father of three sons.

8) Timothy Lanier Allen remained employed during the times he was not incarcerated.

9) Timothy Lanier Allen was a supporting parent of at least one of his children.

10) Any other circumstances or circumstances arising from the evidence which the jury deems to have a mitigating value.

---

[1] North Carolina law requires a trial judge to make an initial finding that the evidence presented supports the proposed mitigating circumstance. N.C. Gen. Stat. § 15A-2000(b). It is proper for a trial court to submit a mitigating circumstance to the jury only when it is supported by "substantial evidence." *State v. Laws*, 381 S.E.2d 609, 626 (N.C. 1989), *sentence vacated on other grounds by Laws v. North Carolina*, 494 U.S. 1022 (1990). The state court fact finding as to all ten of the mitigating circumstances submitted to Respondent's jury must be presumed correct. 28 U.S.C. § 2254(e)(1).

The jury deliberated for about four and a half hours before returning a verdict of death. Instructed that findings in mitigation must be unanimous, the jury found the first three mitigating circumstances on this list, but failed to find unanimously the remaining seven circumstances.

The trial court proceeded to poll the jurors. During the jury poll, the court clerk read the entire verdict form and the answers written on the form by the jury. This form included the question, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The clerk also recited that portion of the verdict form where jurors were instructed as to their findings in mitigation: "In the space after each mitigating circumstance, write 'yes' if you unanimously find that mitigating circumstance by a preponderance of the evidence" and "Write 'no' if you do not unanimously find that mitigating circumstance by a preponderance of the evidence." Among the mitigating circumstances recited by the clerk was the final mitigating circumstance which asked whether there were "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." Following the clerk's recitation of the entire, four-page verdict form, each juror was then asked:

- Are these the answers to your issues?
- Are these still the answers to the issues?
- Do you still assent thereto?

All of the jurors answered these three questions affirmatively.

On direct appeal, Respondent argued that the instruction and verdict form requiring juror unanimity on findings in mitigation were unconstitutional in light of *Mills v. Maryland*, 486 U.S. 367 (1988). The Supreme Court of North Carolina rejected this argument. *State v. Allen*, 372 S.E.2d 855, 868 (N.C. 1988). Respondent petitioned for *certiorari* review in this Court. While his *certiorari* petition was pending, this Court decided *McKoy v. North Carolina*, 494 U.S. 433 (1990), in which a nearly identical instruction was found unconstitutional. This Court remanded Respondent's case. *Allen v. North Carolina*, 494 U.S. 1021 (1990). On remand, the Supreme Court of North Carolina considered the *McKoy* error. *State v. Allen*, 417 S.E.2d 227 (N.C. 1992). The Court conceded that the trial court gave Respondent's jury the unanimity instruction deemed unconstitutional in *McKoy*, but concluded the error was harmless:

> In this case, ten mitigating circumstances were submitted to the jury. The jury found three of the mitigating circumstances and did not find seven of them. When the verdict was returned, the trial judge announced that the jury would be polled. She said, "[y]ou will be asked individually as to your answers to the issues and as to the recommendation." The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still assented thereto. Each juror answered in the affirmative.
>
> It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find. No juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case. We hold this error was harmless beyond a reasonable doubt. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 673 (1991).

417 S.E.2d at 228.

Respondent brought forward his *McKoy* claim in his Petition for Writ of Habeas Corpus. The district court denied relief on this claim but issued a Certificate of Appealability. On February 5, 2003, following briefing and oral argument, a panel of the Fourth Circuit Court of Appeals issued an opinion finding that Respondent was entitled to a writ of habeas corpus on his *McKoy* claim. *Allen v. Lee*, 319 F.3d 645 (4th Cir. 2003). Applying 28 U.S.C. 2254(d)(1), the panel found that the Supreme Court of North Carolina's adjudication of Respondent's *McKoy* claim and its determination of harmlessness based on the jury poll were unreasonable. 319 F.3d at 648. According to the panel,

> The jury poll in this case neither instructed the jury nor amended an instruction. It merely confirmed a juror's vote based on the instructions already given by the court. Because the instructions themselves were unconstitutional, the poll merely confirmed that each juror followed these instructions in sentencing Allen to death. Thus, the poll alone could not possibly cure the error.

Id. at 657 (footnote omitted).

The State petitioned for rehearing. On April 28, 2004, following reargument, the U.S. Court of Appeals for the Fourth Circuit sitting *en banc* granted a writ of habeas corpus to Petitioner, vacated his death sentence, and ordered resentencing on the *McKoy* claim. *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2003) (*en banc*). The judgment of the Court was issued in a *per curiam* opinion. Seven members of the Court of Appeals agreed that the Supreme Court of North Carolina's determination that the *McKoy* error was harmless beyond a reasonable doubt resulted in a decision that involved an unreasonable application of clearly established federal law as determined by this Court and that the error had a substantial and injurious effect on the sentencing verdict. 366 F.3d at 322.

Two members of the Court of Appeals filed opinions setting out why Respondent was entitled to habeas relief on his *McKoy* claim. *See id.* at 340-49 (plurality opinion of Gregory, J., Wilkins, C.J., and Michael, Motz, and King, J.J.), and *id.* at 332-40 (opinion of Traxler and Shedd, J.J.). Chief Justice Wilkins concurred in the plurality opinion and also wrote a separate concurrence joined by Judge Motz. *See id.* at 331-32. The State has asked this Court to review the Court of Appeals' decision to grant a writ of habeas corpus.

ARGUMENT

I. NO QUESTION WORTHY OF *CERTIORARI* REVIEW HAS BEEN PRESENTED.

The Court of Appeals granted relief on the basis of a constitutional error identified by this Court more than a decade ago in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). Other than Maryland and North Carolina, only Pennsylvania has used the unanimity instruction on mitigating circumstances deemed unconstitutional in *Mills* and *McKoy*. In the nearly 15 years since *McKoy* was decided, no capital sentencing jury in the country has been given a unanimity instruction on mitigating circumstances. And just recently, this Court determined that the rule announced in *Mills* was not retroactively applicable to cases pending on habeas review. *Beard v. Banks*, 124 S.Ct. 2504 (2004). Consequently, the *en banc* plurality of the Court of Appeals was surely correct in noting that the constitutional error here was a "rare case" that was "not likely to arise anytime in the future," not least because "*McKoy* errors in general should be a remnant of the past." 366 F.3d at 343 (opinion of Gregory, J.).

Respondent's case is unique not only because it involves a long-ago-established constitutional error that tainted capital sentencing in only three states, but also because of the peculiar fact pattern underlying both the § 2254(d)(1) and *Brecht* analyses. In particular, the reasonableness of the state court's determination that the *McKoy* error was harmless turned on a textual analysis of a post-verdict jury poll. Similarly, the *Brecht* analysis turned on a careful reading of the trial record and weighing of the evidence in aggravation against the diverse mitigating circumstances not found unanimously by the jury. The likelihood of such a fact pattern recurring in the future is remote. Consequently, it can hardly be said that there is any serious public interest or important universal principle in Respondent's case.

The State has pointed to no significant constitutional rule at stake in this case. Indeed, the basis of much of the State's Petition appears to be the views of a single judge who dissented from the order denying the State's petition for rehearing of the Court of Appeals' *en banc* decision.[2] This is because the case involves a simple application of law to the peculiar facts presented. Accordingly, there is no credible suggestion in the State's Petition that the Court of Appeals applied the wrong legal standards to determine Respondent's entitlement to habeas relief pursuant to § 2254(d)(1) and *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Nor is there any evidence of a conflict in the Circuit Courts on any issue arising in Respondent's case. Consequently,

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[2] Contrary to rules of this Court, the State placed Judge Luttig's opinion dissenting from the denial of rehearing first in its Appendix. *See Rules of the Supreme Court of the United States*, Rule 14(i) (setting out sequence of orders and opinions to be contained in appendix).

this Court's interest in ensuring uniformity on issues of federal law is not implicated. For all of these reasons, this Court should not expend its scarce resources addressing the State's contention that the Court of Appeals erred in applying hornbook law to a singular set of facts.

II. THE COURT OF APPEALS PROPERLY APPLIED GOVERNING LEGAL STANDARDS TO RESPONDENT'S *McKOY* CLAIM.

A. The Court of Appeals Properly Construed 28 U.S.C. § 2254(d)(1) in Finding that the State Court's Adjudication of Respondent's *McKoy* Claim was Objectively Unreasonable.

The Court of Appeals properly concluded that 28 U.S.C. § 2254(d)(1) does not bar Respondent from obtaining habeas relief. Pursuant to this statutory provision, a federal court may not grant a writ of habeas corpus unless the state court's adjudication of the claim was "contrary to" or involved an "unreasonable application" of clearly established law as defined by this Court. The Court of Appeals found objectively unreasonable the Supreme Court of North Carolina's determination that the *McKoy* error in Respondent's case was harmless beyond a reasonable doubt. That finding should not be disturbed by this Court.

A state court adjudication is "unreasonable" when the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). In *Williams* and subsequent decisions, this Court has explained how a state court adjudication might be unreasonable pursuant to § 2254(d)(1).

One way a state court adjudication might be unreasonable is if the state court fails to consider all of the relevant evidence. *See Williams*, 529 U.S. at 416 (granting habeas relief on ineffective assistance of counsel claim and finding an unreasonable application of clearly established law because of the state court's "obvious failure to consider the totality of the omitted mitigation evidence"). *Williams* also illustrated a second way in which a state court adjudication might be unreasonable under § 2254(d)(1), namely the failure of the state court to "accord appropriate weight" to the body of relevant evidence. *Id.* at 398. In *Williams*, this failure was demonstrated by the state court's lack of analysis of the significance jurors might have given to unfound mitigation when weighed against the evidence in aggravation. *Id.*

In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court again applied § 2254(d)(1) to a claim of ineffective assistance of counsel and ordered habeas relief. *Wiggins* demonstrated that a state court adjudication is unreasonable when it does not evaluate the constitutional error from the vantage point of the parties at the time the error occurred. *See id.* at 527-28 (finding fault with state court for invoking "a *post-hoc* rationalization of counsel's conduct" rather relying on "an accurate description of their deliberations prior to sentencing"). The *Wiggins*' Court also indicated that a state court adjudication is unreasonable when it does not conduct a thorough analysis of the constitutional error. *See id.* at 527 (state court's application of *Strickland* standard was objectively unreasonable because the state court "merely assumed that [counsel's] investigation was adequate").

Applying these principles to Respondent's case, it is clear that the Court of Appeals properly concluded that the Supreme Court of North Carolina's determination of harmlessness was objectively unreasonable. First, as noted by the Court of Appeals, the Supreme Court of North Carolina failed to consider and give weight to all of the relevant record evidence, including the fact that the unconstitutional unanimity instruction was repeated in the post-verdict jury poll. 366 F.3d at 341-42. The court clerk read the entire verdict form before polling individual jurors. This form asked jurors, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The verdict form read to jurors during the poll also included a recitation of the instructions to, "write 'yes' if you unanimously find that mitigating circumstance . . . [and] . . . 'no' if you do not unanimously find that mitigating circumstance." *Id.* (emphasis supplied in Court's opinion). Only after hearing yet another recitation of the constitutional error were jurors asked one by one to confirm that they had followed the constitutionally flawed instruction. Indeed, a reasonable juror may have interpreted the poll to inquire no more than whether the jury foreperson had correctly filled out the verdict form in accordance with the unanimity instruction.

As noted by the Court of Appeals, no juror was asked how he or she individually voted on any of the mitigating circumstances, let alone how the juror would have voted had the trial court given different instructions as to findings in mitigation. *Id.* at 342. To the contrary, jurors were asked during the poll whether there were "any other circumstance or circumstances arising from the evidence which you, the jury, deem to

have mitigating value." *Id.* (emphasis supplied in Court's opinion). Thus, when jurors were asked, "Are these the answers to your issues?," "Are these still the answers to the issues?," and "Do you still assent thereto?," they were "not being asked for their individual votes" on the mitigating circumstances, but whether "they still assented to the jury's collective decisions." *Id.* As a consequence, "the poll merely confirmed that each juror followed the trial court's unconstitutional instruction in sentencing Allen to death." *Id.* at 341.

The North Carolina court was also unreasonable in failing to consider the poll from the vantage point of the jurors at the time of Respondent's sentencing hearing. When Respondent was tried and sentenced to death, *Mills* and *McKoy* had not yet been decided. Consequently, no one, including the trial court, regarded the poll as a curative device to determine the votes of each individual juror as to each individual mitigating circumstance. Under these circumstances, it was unreasonable for the North Carolina court to imbue the poll with power and meaning it did not have and to base its determination of harmlessness on a jury poll that was "never designed to, nor did it, cure the *McKoy* error." 366 F.3d at 341. Unlike the state supreme court, the Court of Appeals properly focused on the "critical stage" at which the unconstitutional error occurred and analyzed the "effects of the unanimity requirement on the jury's internal deliberations." *Id.* at 342. The Court of Appeals then concluded that the jury polled failed to "provide any meaningful insight . . . on the critical issue of whether any individual juror voted for a given mitigating factor." *Id.* The state supreme court's conclusion to the contrary was clearly unreasonable.

Finally, the Supreme Court of North Carolina's harmlessness determination was unreasonable because it "merely assumed" on the basis of jury poll that jurors had unanimously rejected the seven mitigating circumstances. 417 S.E.2d at 228. However, the *raison d'etre* of *McKoy* is the understanding that the unanimity instruction "allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." *McKoy*, 494 U.S. at 439. Thus, as to the seven unfound mitigating factors, a "no" vote indicated no more and no less than the fact that anywhere from zero to eleven jurors may have believed the evidence to have mitigating value that weighed in favor of a life sentence for Respondent. In assuming that the poll necessarily demonstrated that jurors unanimously rejected the unfound mitigating circumstances, the state supreme court echoed the analysis expressly rejected by this Court in *Mills*. Certainly it was unreasonable after *Mills*, and even more so after *McKoy*, to make such an assumption.

The State has offered no persuasive reason why the decision of the Court of Appeals should be disturbed. Applying this Court's precedents dealing with § 2254(d)(1), the Court of Appeals properly found the state court's determination of harmlessness to be objectively unreasonable. The Writ of *Certiorari* should be denied.

B. The Court of Appeals Properly Applied the *Brecht* Harmless Error Standard to the Constitutional Error in this Case.

The Court of Appeals properly concluded that the *McKoy* error in Respondent's case had a "substantial and injurious effect" and thus, pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), Respondent was entitled to habeas relief. Under *Brecht*, a writ of

habeas corpus may not be granted unless, "in light of the record as a whole," the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638. When the habeas court is "in grave doubt" about whether the constitutional error had a substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless and the writ must issue. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). From the perspective of the prisoner seeking habeas relief, the *Brecht* harmless error standard is less onerous than both preponderance of the evidence and the reasonable probability standard applied to claims of ineffective assistance of counsel and prosecutorial suppression of exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (finding of reasonable probability of different result "necessarily entails the conclusion" that error is harmless under *Brecht*).

In determining Respondent's entitlement to habeas relief, the Court of Appeals clearly applied this standard and articulated its reasoning in the three opinions filed in addition to the *per curiam* opinion. *See* 366 F.3d at 332 (opinion of Wilkins, C.J.) ("Based on my experiences as a trial judge and prosecuting attorney . . . I remain in grave doubt about whether the error was harmless."); *id.* at 337 (opinion of Traxler, J.) (" . . . the nature of the error in this case unquestionably leaves me in grave doubt as to whether it was in fact harmless."); *id.* at 349 (opinion of Gregory, J.) ("Thus, we hold that the *McKoy* error had a 'substantial and injurious effect or influence in determining the jury's verdict' warranting habeas relief under *Brecht*. At a minimum, the likelihood that a properly-instructed jury would not have voted to unanimously impose the death penalty is sufficiently great to raise 'grave doubt' as to whether the *McKoy* error was harmless.").

It is similarly clear that the Court of Appeals properly considered the *McKoy* error in the context of the entire record of Respondent's case, including the circumstances of the crime and aggravating circumstances. Indeed, the plurality opinion acknowledged that Respondent had committed a "terrible" and "horrible" crime, and noted no few than ten times the aggravating circumstances found unanimously by the jury. 366 F.3d at 344-48. *See also id.* at 332-33, 337-38 (opinion of Traxler, J.) (discussing crime scene, medical evidence, and aggravating circumstances).

The constitutional error in this case went to the heart of the life and death decision each of the twelve jurors was called upon to make. As a consequence of the constitutional error, Respondent was sentenced to death by a jury that was precluded from considering significant evidence in mitigation. In its three opinions, the Court of Appeals judges expressed their diverse views of the unfound mitigation. *See* 366 F.3d at 332 (opinion of Wilkins, J.) (emphasizing Respondent's close relationship with his eldest son and likelihood that reasonable juror could have concluded life sentence was appropriate based on "sincere feelings of mercy"); *id.* at 337 (opinion of Traxler, J.) (explaining "virtual equipoise" as to harmlessness of the error in light of evidence of Respondent's unfortunate background and "significant adolescent problems" as well as his close and ongoing relationships with family members, and positive record of employment); *id.* at 346 (opinion of Gregory, J.) (finding "sufficient likelihood" that at least one juror would have been persuaded to spare Respondent's life in light of evidence he was raised in single-parent home, witnessed his parents' petrifying physical fights, and "lost himself in alcohol and drugs").

That diversity reflects and supports the view that individual jurors, faced with this evidence of Respondent's life history and, considering it in conjunction with the unanimously-found circumstances of Petitioner's remorse and lack of criminal history, may well have been swayed to reject the death penalty. The Court of Appeals fully considered all of the evidence and properly concluded that the *McKoy* error in this case had a substantial and injurious effect or influence on the jury verdict.

CONCLUSION

For the reasons discussed herein, this Court should deny the State's Petition for Writ of *Certiorari*.

Respectfully submitted, this the 18th day of August 2004.

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Supreme Court, U.S.
FILED
AUG 18 2004
OFFICE OF THE CLERK

No. 04-147

In the Supreme Court of the United States

MARVIN POLK,
v.
TIMOTHY ALLEN,

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 of the Rules of the Unites States Supreme Court, petitioner TIMOTHY LANIER ALLEN asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari, without payment of costs, and to proceed *in forma pauperis*. The undersigned has been appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006A.

Respectfully submitted,

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